

No. 10188

United States

Circuit Court of Appeals

For the Ninth Circuit.

1
vol

2310

AMERICAN SURETY COMPANY, a Corpora-
tion, and E. L. McDOUGAL,

Appellants,

vs.

THE BANK OF CALIFORNIA, NATIONAL
ASSOCIATION, a Corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
For the District of Oregon

FILED

AUG 11 1942

PAUL P. O'BRIEN,

CLERK

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Circuit Court of Appeals
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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Answer	16
Appeal:	
Application for Permission to Omit Printing Exhibits on.....	356
Bond for Costs on.....	91
Certificate of Clerk to Transcript of Record on	104
Designation, Amended, of Contents of Record on	96
Motion for Order Extending Time to File Record on	93
Notice of	90
Order re Exhibits.....	103
Order Extending Time to File Record on	95, 102
Statement of Points to be Relied on by Appellants on	351
Stipulation for Extension of Time to File Record on	94, 101
Stipulation re Exhibits.....	98

Index	Page
Application for Permission to Omit Certain Exhibits from Printing and Affidavit in Support Thereof	356
Bond for Costs on Appeal.....	91
Certificate of Clerk to Transcript of Record....	104
Complaint	2
Answer to	16
Conclusions of Law.....	65
Designation, Amended, of Contents of Record on Appeal, District Court.....	96
Exhibits:	
Application for Permission to Omit from Printing	356
Order Directing Originals to be Sent to the Circuit Court of Appeals.....	103
Stipulation re Omission of the Printing..	98
Findings of Facts and Conclusions of Law.....	44
Judgment	68
Motion for Order Extending Time to File Record on Appeal.....	93
Motion of Defendant to Dismiss.....	11
Affidavit of E. F. Munly.....	13
Order Deferring	15
Order Overruling	43

Index	Page
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	90
Opinion—December 23, 1941.....	69
Order Deferring Motion to Dismiss.....	15
Order Overruling Motion to Dismiss.....	43
Order, Pre-Trial	26
Order Extending Time to File Record on Ap- peal to June 25, 1942.....	95
Order Extending Time to File Record on Ap- peal to July 10, 1942.....	102
Order Directing Original Exhibits to be Sent to the Circuit Court of Appeals.....	103
Pre-Trial Order	26
Statement of Points to be Relied on by Appel- lants	351
Stipulation Relative to Exhibits.....	98
Stipulation for Extension of Time to File Rec- ord on Appeal to June 25, 1942.....	94
Order Extending Time.....	95
Stipulation for Extension of Time to File Rec- ord on Appeal to July 10, 1942.....	101
Order Extending Time.....	102
Transcript of Testimony.....	105

Index

Page

Exhibits for Plaintiffs:

- 1—Four checks introduced as part of Exhibit 1: Check No. 3536, September 8, 1938, Payee, C. W. Clark, Amount \$46.78; No. 4339, January 27, 1939, Payee W. B. Farthing, Amount \$42.75; No. 4996, April 3, 1939, C. C. Elledge, Amount \$99.00; No. 4726, March 3, 1939, Payee Dick Sperry, Amount \$28.51. . . 117-120
- 2—Photostat copy of payroll voucher No. 4004, Payee Ed Thorpe, December 2, 1938, Amount \$76.03. . . 173
- 3—Statement of Funds Withdrawn, with Accompanying Schedules, prepared by Price, Waterhouse & Company 221
- 7—Insurance Policy of American Surety Company of New York, dated July 1, 1932. 179
- 8—Insurance Policy of Lloyd's of London, dated May 3, 1938. 187
- 9—Insurance Policy of Lloyd's, London, dated May 18, 1939. 198
- 14—Assignment of Lloyd's Portion of Loss to E. L. McDougal, dated October 25, 1939. 209

Index

Page

Witnesses for Defendant:

Chrystall, A. M.

—recalled, direct 325

Crowe, G. L.

—recalled, direct..... 307

—cross 312

—redirect 316

—recross 317

Griffis, R. G.

—recalled, direct252, 294

—cross 299

—redirect 302

—recross 305

Lawson, J. B. W.

—recalled, direct 320

—cross 324

Munly, E. F.

—direct 329

—cross 333

—redirect 336

Rawlinson, Charles E.

—recalled, direct277, 287

—cross 292

Wood, I. D.

—direct 336

Index	Page
Witnesses for Plaintiffs:	
Chrystall, A. M.	
—direct	149
—cross	152
Crowe, G. L.	
—direct	164, 216
—cross	234
—redirect	250
Griffis, R. G.	
—direct	161
Johnson, J. F.	
—direct	108
—recalled, cross	158
Lawson, J. B. W.	
—direct	154
—cross	157
—redirect	157
Rawlinson, Charles E.	
—direct	111
—cross	134

NAMES AND ADDRESSES OF ATTORNEYS
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Portland, Oregon;

E. L. McDOUGAL,
American Bank Building,
Portland, Oregon;

RANDALL S. JONES,
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Portland, Oregon.

For Appellee:

McCAMANT, KING & WOOD, BORDEN
WOOD, and ROBERT S. MILLER,
American Bank Building,
Portland, Oregon.

In the District Court of the United States
For the District of Oregon

November Term, 1939

Be It Remembered, that on the 11th day of January, 1940, there was duly filed in the District Court of the United States for the District of Oregon, a Complaint in words and figures as follows, to wit:

[1]*

In the District Court of the United States
For the District of Oregon

No. 10188

AMERICAN SURETY COMPANY OF NEW
YORK, a Corporation, and E. L. McDOUGAL,
Plaintiffs,

vs.

THE BANK OF CALIFORNIA, NATIONAL
ASSOCIATION, a Corporation,
Defendant.

COMPLAINT.

Plaintiffs complain and for cause of action against the defendant allege:

I.

During all of the times hereinafter mentioned, plaintiff American Surety Company of New York, was and now is a corporation organized and exist-

*Page numbering appearing at foot of page of original certified Transcript of Record.

ing under and by virtue of the laws of the State of New York, with its home office and principal place of business in the City of New York, State of New York, and it is a resident and citizen of the State of New York and now is and at all times hereinafter mentioned was engaged in the business of writing surety and other bonds.

II.

Plaintiff E. L. McDougal is a citizen and resident of the State of Oregon.

III.

During all of the times hereinafter mentioned defendant, The Bank of California, National Association, was and now is a national banking association incorporated under the laws of the United States with its home office and principal place of business in the City of San Francisco, State of California, and with a branch bank in Portland, Oregon, and is doing business in the State of Oregon. [2]

IV.

During all of the times hereinafter mentioned, Interior Warehouse Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Oregon, with its principal place of business in the City of Portland, State of Oregon.

V.

There is a diversity of citizenship and the matter in controversy exclusive of interest and costs exceeds the sum of \$3,000.00.

VI.

That between September 1, 1935, and May 2, 1939, and during all times herein mentioned, the Interior Warehouse Company, a corporation, was a depositor in the defendant's branch bank in the City of Portland, Oregon, and during all the said times maintained a deposit and checking account and had deposited with defendant bank to the credit of said account funds in excess of the amounts hereinafter set forth, and there existed a credit in its favor for the money it had deposited with the defendant.

VII.

That between said dates the defendant wrongfully charged and deducted from the deposits in the checking account of the Interior Warehouse Company, a corporation, the sum of \$6,562.33, the same being the total of 126 separate checks made payable to the order of various payees named in said checks; that defendant paid the amount specified in each of said checks, and charged the amount thereof against the deposit account of said Interior Warehouse Company, a corporation, but that in paying said amounts defendant did not follow any directions or authorization of said Interior Warehouse Company, a corporation, or pay any such amounts to any lawful holder or owner of any of said checks for the reason that in each instance the endorsement of each payee of said checks [3] was forged and in no instance did any payee of any of said checks authorize any payment to be made thereon.

VIII.

That a description of each of said checks giving the date of issue thereof, number, name of payee and amount, is as follows:

Date of Issue	Check Number	Name of Payee	Amount
Apr. 21, 1939	5117	C. Warren	\$ 41.55
Feb. 24, 1939	4653	C. Clarkson	42.00
Sept. 8, 1938	3536	C. W. Clark	46.78
Sept. 1, 1938	3461	C. W. Clark	42.57
Aug. 26, 1938	3423	C. W. Clark	47.77
Aug. 19, 1938	3383	C. W. Clark	51.97
July 22, 1938	3184	C. W. Clark	34.15
June 30, 1938	3059	C. W. Clark	42.17
June 23, 1938	3039	C. W. Clark	33.24
June 9, 1938	2978	C. W. Clark	33.86
May 27, 1938	2886	C. W. Clark	28.84
May 19, 1938	2877	C. W. Clark	28.81
May 13, 1938	2852	C. W. Clark	29.70
Apr. 21, 1938	2770	C. W. Clark	36.66
Apr. 14, 1938	2728	C. W. Clark	49.99
Mar. 25, 1938	2586	L. G. Gross	33.73
Mar. 11, 1938	2473	C. W. Clark	36.33
Feb. 17, 1938	2337	C. W. Clark	36.38
Feb. 10, 1938	2292	C. W. Clark	45.79
Jan. 20, 1938	2125	C. W. Clark	37.97
Jan. 13, 1938	2094	A. R. Reed	31.98
Dec. 23, 1937	1950	C. W. Carey	35.64
Dec. 16, 1937	1925	C. W. Carey	37.15
Dec. 10, 1937	1871	C. W. Carey	31.60
Dec. 3, 1937	1807	C. W. Carey	41.58
Nov. 18, 1937	1625	C. W. Carey	50.54
Nov. 11, 1937	1532	C. W. Carey	30.79
Nov. 4, 1937	1479	C. W. Carey	33.66
Oct. 28, 1937	1369	C. W. Carey	35.64
Oct. 21, 1937	1344	C. W. Carey	34.38
June 24, 1937	713	B. Stewart	30.94
Nov. 15, 1936	B15889	R. Mcaycal	41.66
Dec. 31, 1935	B15007	J. Moore	30.00
Jan. 27, 1939	4339	W. B. Farthing	42.75

Date of Issue	Check Number	Name of Payee	Amount
Oct. 21, 1938	3698	W. H. Hemming	\$ 30.63
July 23, 1937	811	F. Franz	15.05
July 23, 1937	792	A. Stoutenburg	40.99
July 1, 1937	723	R. P. Rawls	31.98
May 20, 1937	617	A. Stoutenburg	42.12
Apr. 22, 1937	505	W. H. Hemming	33.62
Oct. 29, 1936	B15857	J. Fenton	24.30
Oct. 22, 1936	B15816	R. McAyeal	52.95
Sept. 17, 1936	B15670	A. Wright	31.20
Sept. 10, 1936	B15620	E. Foss	24.00
Apr. 3, 1939	4996	C. C. Elledge	99.00
Jan. 6, 1939	4233	W. C. Bumgarner	128.70
Jan. 6, 1939	560	W. C. Bumgarner	40.11
Nov. 14, 1938	3895	J. A. Frischknecht	49.50
Nov. 1, 1938	3749	Roy Lamb	89.10
Oct. 15, 1938	3691	J. A. Frischknecht	49.50
[4]			
Aug. 15, 1938	3373	J. A. Frischknecht	49.50
July 14, 1938	3156	J. A. Frischknecht	49.50
July 5, 1938	3126	F. A. Darnielle	50.00
June 3, 1938	2944	C. C. Elledge	74.25
May 2, 1938	2812	Roy Lamb	84.15
Feb. 15, 1938	2330	J. A. Frischknecht	49.50
Feb. 2, 1938	2259	C. C. Elledge	74.25
Jan. 15, 1938	2113	J. A. Frischknecht	49.50
Dec. 15, 1937	1909	J. A. Frischknecht	49.50
Dec. 6, 1937	1845	P. Henning	60.00
Nov. 15, 1937	1612	J. A. Frischknecht	49.50
Nov. 1, 1937	1453	C. C. Elledge	74.25
Oct. 4, 1937	1243	Roy Lamb	88.70
Sept. 30, 1937	1255	C. G. Starr	74.25
Sept. 15, 1937	1140	J. A. Frischknecht	49.50
Sept. 3, 1937	1118	C. C. Elledge	74.25
Aug. 14, 1937	942	J. A. Frischknecht	49.50
Aug. 4, 1937	860	C. G. Starr	74.25
July 15, 1937	765	J. A. Frischknecht	49.50
July 2, 1937	742	W. C. Bumgarner	123.75
June 3, 1937	657	Roy Lamb	79.20
May 4, 1937	575	Roy Lamb	49.20
May 3, 1937	549	C. C. Elledge	74.25

The Bank of California

7

Date of Issue	Check Number	Name of Payee	Amount
April 1, 1937	429	Roy Lamb	\$79.20
Mar. 3, 1937	139	Roy Lamb	79.20
Feb. 2, 1937	A10753	Roy Lamb	79.20
Jan. 4, 1937	A10680	J. A. Frischknecht	50.00
Nov. 3, 1936	A10598	P. Henning	60.00
Oct. 15, 1936	A10552	J. A. Frischknecht	50.00
Oct. 3, 1936	A10547	C. C. Elledge	74.25
Sept. 15, 1936	A10479	J. A. Frischknecht	50.00
Mar. 3, 1939	4726	Dick Sperry	28.51
Mar. 3, 1939	4725	Henry Robertson	31.68
Mar. 3, 1939	4724	Ed. Thorpe	76.03
Feb. 2, 1939	4409	Ed. Thorpe	79.20
Feb. 2, 1939	4408	Dick Sperry	4.75
Jan. 4, 1939	4223	Ed. Thorpe	82.37
Oct. 3, 1938	3650	M. Fennimore	78.41
Sept. 6, 1938	3512	Fred Mutt	56.43
Sept. 6, 1938	3511	C. H. Peters	130.68
Aug. 2, 1938	3266	Kemper Snow	33.66
Aug. 2, 1938	3265	Joe Green	123.75
Aug. 2, 1938	3264	Ed. Thorpe	123.75
June 1, 1938	2920	Roy Lamb	84.15
Apr. 5, 1938	2701	J. E. Flor	50.23
Apr. 2, 1938	2687	Ed. Thorpe	90.68
Feb. 1, 1938	2240	Robt. Stilson	25.24
Jan. 3, 1938	2035	Roy Lamb	84.15
Sept. 2, 1937	1064	L. G. Speak	80.19
Aug. 3, 1937	849	M. Fennimore	59.40
Sept. 3, 1936	A10451	E. J. Ricker	70.09
Oct. 2, 1935	A9880	M. N. Mellick	20.00
Oct. 2, 1935	A9879	Ed. Mellick	20.00
Oct. 2, 1935	A9878	N. A. Campbell	28.80
Dec. 5, 1938	4016	C. C. Elledge	99.00
Dec. 2, 1938	4004	Ed. Thorpe	76.03
Dec. 2, 1938	4003	Dick Sperry	11.09
Dec. 1, 1938	3965	Roy Lamb	89.10
Nov. 2, 1938	3762	Dick Sperry	34.16
Nov. 2, 1938	3761	Kemper Snow	87.12
			[5]
Nov. 2, 1938	3760	Ed Thorpe	120.78
Aug. 31, 1938	3499	J. W. Bradley	17.82
Aug. 31, 1938	3496	John Klamert	8.91

Date of Issue	Check Number	Name of Payee	Amount
Aug. 31, 1938	3483	John Klamert	\$ 60.38
Dec. 10, 1936	B15920	W. H. Hemming	25.50
Dec. 1, 1936	A10622	Roy Lamb	80.00
Aug. 27, 1936	B15566	F. N. Alexander	43.20
Aug. 3, 1936	A10346	J. A. Frischknecht	50.00
July 9, 1936	B15367	A. Rieman	14.40
July 3, 1936	A10323	P. Henning	49.50
July 1, 1936	A10292	Roy Lamb	19.50
June 18, 1936	B15340	G. Edmonson	14.40
May 1936	A10230	(The carbon copy of the numbered check has been torn out. The payee of the preceding check (No. 10229) was P. Henning, an employee, and it has been assumed that the carbon copy of check No. 10230 originally showed the same payee)	49.50
Sept. 30, 1937	81	Frank D. Hatcher	23.86
Sept. 30, 1936	A10485	Frank Hatcher	24.91
Jan. 4, 1937	A10689	R. W. Umbarger	7.60

X.

That said Interior Warehouse Company, a corporation, had a policy of insurance with the Underwriters at Lloyd's of London, by reason of which it was entitled to and did receive from the Underwriters at Lloyd's of London, the sum of \$5,562.33 of the charges wrongfully deducted from its deposits in the checking account in defendant's bank; and also, the Interior Warehouse Company, a corporation, had a policy of insurance with the plaintiff, American Surety Company of New York, a corporation, by reason of which it was entitled to and

did receive from the American Surety Company of New York, the sum of \$1,000.00 of the charges wrongfully deducted from its deposits in the checking account of the defendant bank.

XI.

That by reason thereof defendant became indebted to said Interior Warehouse Company, a corporation, in the sum of \$6,562.33 which said sum defendant has refused to pay to said Interior Warehouse Company, a corporation, or to the plaintiffs herein, although within a reasonable time after said wrongful payments of said checks and within a reasonable time after knowledge thereof by said [6] Interior Warehouse Company said Interior Warehouse Company and plaintiffs on or about October 16, 1939, notified defendant of said wrongful payments and tendered said checks to defendant and demanded payment of the several amounts thereof.

XII.

That under the terms of said policies of insurance and in accordance with the provisions therein, the Interior Warehouse Company, a corporation, upon payment of said sums, assigned to the Underwriters at Lloyd's of London and the American Surety Company of New York, respectively, for the amount of said loss paid under their respective policies, its claim against the defendant.

XIII.

That prior to the commencement of this action the Underwriters at Lloyd's of London, to whom

the claim was assigned as above stated, assigned said claim to plaintiff, E. L. McDougal.

XIV.

That the defendant owes plaintiff, E. L. McDougal, the sum of \$5,562.33, together with interest at the legal rate from the 16th day of October, 1939, and defendant owes plaintiff, American Surety Company of New York, the sum of \$1,000.00 together with interest at the legal rate from the 16th day of October, 1939.

Wherefore, plaintiffs pray judgment against the defendant in the sum of \$5,562.33 together with the legal rate of interest thereon from the 16th day of October, 1939, and for the further sum of \$1,000.00 together with interest at the legal rate from the 16th day of October, 1939, and for their costs and disbursements incurred herein.

PLOWDEN STOTT

CAKE, JAUREGUY & TOOZE,

Address: Yeon Building, Portland, Ore.

E. L. McDOUGAL,

RANDALL S. JONES,

Attorneys for Plaintiffs. [7]

Address: American Bank Building,

Portland, Oregon

(Duly verified.)

[Endorsed]: Filed January 11, 1940. [8]

And afterwards, to wit, on the 1st day of February, 1940, there was duly filed in said Court, a Motion of defendant to Dismiss, in words and figures as follows, to wit: [9]

[Title of District Court and Cause.]

MOTION OF
DEFENDANT AND AFFIDAVIT

Comes now the defendant by its attorneys and, based upon the files and records of this court in this cause (and, as to paragraph 1 hereof, based also upon the affidavit of E. F. Munly hereto attached and by reference made a part hereof), moves the court as follows:

1. For an order dismissing this cause on the ground that the court lacks jurisdiction in that at the time of the institution of this cause Interior Warehouse Company and plaintiff E. L. McDougal, and each of them, were citizens and residents of the State of Oregon and defendant may have been, for the purposes of this cause, also a citizen and resident of the State of Oregon. Defendant suggests that the court lacks jurisdiction in that at the time of the institution of this cause Interior Warehouse Company, plaintiff E. L. McDougal and defendant, and each of them, may have been citizens and residents of the same state.

2. Without waiving the foregoing, for an order

dismissing this cause as to plaintiff American Surety Company of New York on the ground that the court lacks jurisdiction in that the amount actually in controversy between [10] said plaintiff and defendant is less than three thousand dollars, exclusive of interest and costs.

3. Without waiving any of the foregoing, for an order dismissing this cause on the ground that the complaint fails to state claims or a claim against defendant upon which relief can be granted in that

(a) Neither by subrogation nor assignment are plaintiffs or either of them entitled to maintain this cause as alleged assignees of the claims or any of the claims specified in said complaint.

(b) Plaintiffs and each of them fail to assert any right to relief in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences.

4. Without waiving any of the foregoing, for an order requiring plaintiffs to state in separate counts and to separately state and number their respective statements of claims on the ground that one or more affirmative defenses might be appropriate to one claim and not to the other.

5. Without waiving any of the foregoing, for an order requiring each plaintiff to state in separate counts and to separately state and number each separate claim respectively claimed by it or him on the ground that the complaint shows that each claim

therein specified is founded upon a separate transaction or occurrence.

BORDEN WOOD,

Attorney for Defendant.

Address: 926 American Bank Building,
Portland, Oregon.

McCAMANT, THOMPSON,

KING & WOOD,

Attorneys for Defendant.

Address: 926 American Bank Building,
Portland, Oregon. [11]

State and District of Oregon,
County of Multnomah—ss.

I, E. F. Munly, being first duly sworn, depose and say that I am one of the assistant managers of the Portland, Oregon, Branch of The Bank of California, National Association, the defendant named in the cause specified in the attached and foregoing motion, and I make this affidavit for and in its behalf in support of paragraph 1 of said motion.

At the time of the institution of said cause and during all of the times in the complaint therein specified said The Bank of California, National Association, was, and continuously since then has been, a national banking association organized and existing under and by virtue of the National Banking Laws of the United States of America, with its home office and principal place of business in the City of San Francisco, State of California. Dur-

ing all of said times Article Second of the Articles of Association of said The Bank of California, National Association, provided and still provides, as follows:

“Second. The place where its banking house or office shall be located and its operations of discount and deposit carried on and its general business conducted, shall be the City and County of San Francisco, State of California, with branches at Portland, Multnomah County, Oregon; Seattle, King County, Washington; Tacoma, Pierce County, Washington, and Virginia City, Storey County, Nevada.”

During all of said times said The Bank of California, National Association, has owned and maintained, and still owns and maintains, a branch at Portland, Multnomah County, State of Oregon, which at all of said times was, and still is located in the State of Oregon and transacting business [12] in the State of Oregon as such branch.

E. F. MUNLY.

Subscribed and sworn to before me this 1st day of February, 1940.

(Seal) CHAS. G. HEPNER,

Notary Public for Oregon.

My commission expires April 12, 1941.

[Endorsed]: Filed February 1, 1940. [13]

And afterwards, to wit, on Saturday, the 13th day of April, 1940, the same being the 35th judi-

cial day of the Regular March 1940 Term of said Court; present the Honorable Claude McColloch, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

[16]

[Title of District Court and Cause.]

ORDER DEFERRING DETERMINATION OF
MOTION

The motion of defendant for an order dismissing the above cause and for other relief having been argued to the Court and briefs having been submitted, and the Court being of the opinion that further hearing and determination thereof should be deferred,

It is hereby ordered that further hearing and the determination of defendant's motion to dismiss and for other relief be, and the same is hereby, deferred until the time of pre-trial hearing or the final trial.

Dated this 13th day of April, 1940.

CLAUDE McCOLLOCH.

[Endorsed]: Filed April 13, 1940. [17]

And afterwards, to wit, on the 3rd day of May, 1940, there was duly filed in said Court, an Answer, in words and figures as follows, to wit: [18]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant and, for good and sufficient answer to the plaintiffs' complaint on file herein, admits, alleges and denies as follows:

I.

Admits the allegations contained in paragraphs I, II, III and IV of the plaintiffs' complaint.

II.

Admits that the matter in controversy, exclusive of interests and costs, exceeds the sum of \$3000. The defendant has suggested to this honorable court, by motion on file herein, and does believe that no diversity of citizenship exists between the plaintiff E. L. McDougal and the Defendant, and therefore denies that there is a diversity of citizenship, as alleged in paragraph V of the complaint.

III.

Admits the allegations contained in paragraph VI of the complaint.

IV.

Admits that the defendant paid the amount specified in each of 126 separate checks made payable to various payees and charged the amount thereof against the deposit account of the Interior Warehouse Company, a corporation, as listed and set forth in paragraph VIII of the complaint, saving and excepting the following such checks:

Date of Issue	Check Number	Name of Payee	Amount
Dec. 5, 1938	4016	C. C. Elledge	\$ 99.00
Dec. 2, 1938	4004	Ed. Thorpe	76.03
Dec. 2, 1938	4003	Dick Sperry	11.09
Dec. 1, 1938	3965	Roy Lamb	89.10
Nov. 2, 1938	3762	Dick Sperry	34.16
Nov. 2, 1938	3761	Kemper Snow	87.12
Nov. 2, 1938	3760	Ed Thorpe	120.78
Aug. 31, 1938	3499	J. W. Bradley	17.82
Aug. 31, 1938	3496	John Klamert	8.91
Aug. 31, 1938	3483	John Klamert	60.38
Dec. 10, 1936	B15920	W. H. Hemming	25.50
Dec. 1, 1936	A10622	Roy Lamb	80.00
Aug. 27, 1936	B15566	F. N. Alexander	43.20
Aug. 3, 1936	A10346	J. A. Frischknecht	50.00
July 9, 1936	B15367	A. Rieman	14.40
July 3, 1936	A10323	P. Henning	49.50
July 1, 1936	A10292	Roy Lamb	19.50
June 18, 1936	B15340	G. Edmonson	14.40
May 1936	A10230		49.50

The defendant does not have any knowledge or information upon which to form a belief as to the truth or falsity of the remaining allegations and matters contained and listed in paragraphs VII and VIII of the complaint, and therefore denies each and every remaining allegation and matter contained therein.

V.

The defendant alleges that it has no knowledge or [20] information upon which to form a belief as to the truth or falsity of the allegations and matters contained in paragraph IX, erroneously numbered X, of the complaint, and therefore denies each and every such allegation and matter contained therein.

VI.

Defendant admits that said Interior Warehouse Company and plaintiffs on or about October 16, 1939, notified the defendant of payments alleged by them to have been wrongful and tendered said checks to defendant and demanded payment of the several amounts thereof, and that the defendant refused to pay to said Interior Warehouse Company or to the plaintiffs herein the sum of \$6,562.33.

The defendant denies each and every other allegation and matter contained in paragraph X, erroneously numbered XI, of the complaint.

VII.

Defendant has no knowledge or information upon which to form a belief as to the truth or falsity of the allegations and matters contained in paragraph XI and XII, erroneously numbered XII and XIII, of the complaint, and therefore denies each and every allegation and matter contained therein.

VIII

Defendant denies each and every allegation contained in paragraph XIII, erroneously numbered XIV, of the complaint.

First Further and Separate Answer and Defense.

Comes now the defendant and, for its first further [21] and separate answer and defense, alleges:

I.

During all of the times hereinafter mentioned, plaintiff American Surety Company of New York

was, and now is, a corporation organized and existing under and by virtue of the laws of the State of New York, with its home office and principal place of business in the City of New York, State of New York, and it is a resident and citizen of the State of New York, and now is, and at all times hereinafter mentioned was, engaged in the business of writing surety and other bonds.

II.

Plaintiff E. L. McDougal is a citizen and resident of the State of Oregon.

III.

During all of the times hereinafter mentioned, The Bank of California, National Association, was, and now is, a national banking association incorporated under the laws of the United States, with its home office and principal place of business in the City of San Francisco, State of California, and with a branch bank in Portland, Oregon, and is, and during all of the times hereinafter mentioned has been, duly qualified to do and doing business in the State of Oregon.

IV.

During all of the times hereinafter mentioned, Interior Warehouse Company was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Oregon, with its principal place of business in the City of Portland, State of Oregon. [22]

V.

Between September 1, 1935, and May 2, 1939, the said Interior Warehouse Company deposited funds in the defendant bank at its branch in the City of Portland, Oregon, from which deposit the defendant paid out the funds of the said Interior Warehouse Company upon checks duly presented to the defendant in the regular course of business when and as directed by said Interior Warehouse Company and upon its order.

VI.

The defendant rendered to the said Interior Warehouse Company on or about the first of every month during all of the times herein mentioned a bank statement of the account of said Interior Warehouse Company in the defendant bank, together with all of the canceled checks of the said Interior Warehouse Company drawn against its deposit with the defendant. A reasonably careful examination of said statements and canceled checks would have disclosed irregularities and discrepancies, if any existed, in the preparation and issuance of pay checks drawn by said Interior Warehouse Company.

VII.

Said Interior Warehouse Company had notice of discrepancies and irregularities in the preparation and issuance of said checks drawn on the defendant if, as a matter of fact, such discrepancies and irregularities existed.

VIII.

If any payments were made by the defendant from the funds of said Interior Warehouse Company upon checks drawn by said Interior Warehouse Company and bearing a forged endorsement of the payee thereon, then such payments by the [23] defendant were the direct and proximate result of the negligence of said Interior Warehouse Company in this, that it failed and refused to adopt and maintain in operation in its business a system of bookkeeping and accounting reasonably necessary to safeguard itself and the defendant from the fraudulent acts of the agents and employees of the said Interior Warehouse Company; it failed and refused to make a careful investigation into the condition of its books, records and statements and the conduct of its employees, and failed and refused to notify the defendant within a reasonable time after it had notice or should have known of the fraudulent acts, if any, of its agents and employees in forging the payees' endorsements upon checks drawn by the Interior Warehouse Company upon the defendant, if any such endorsements were so forged.

Second Further and Separate Answer and Defense
Pro Tanto.

Comes now the defendant and, for its second further and separate answer and defense pro tanto, alleges:

I, II, III and IV

Paragraphs I, II, III and IV of the defendant's first further and separate answers and defense are

here referred to and by reference thereto incorporated herein as fully as if set out in haec verba.

V.

If the Interior Warehouse Company, a corporation, drew checks payable to fictitious and nonexistent persons who neither were, nor at any time had been, in the employ [24] of said Interior Warehouse Company, said checks to be paid by the defendant out of funds deposited for that purpose by said Interior Warehouse Company, then by drawing such checks said Interior Warehouse Company did represent to the defendant that the named payees were existent persons in the employ of said Interior Warehouse Company, which representation was false and misleading. Said Interior Warehouse Company knew, or by reasonable care could have known, that said representations were false and misleading. Said Interior Warehouse Company intended that the defendant rely upon its said representation. Defendant did not know that the payees named in the checks were nonexistent and fictitious and could not have ascertained that said representation was false and misleading. Said representation was relied upon by the defendant, whereby the defendant's risk in making payment upon such checks was greatly increased.

VI.

If the defendant made payments upon such checks to persons not intended by the said Interior Warehouse Company to endorse the payees' signatures

thereon and receive payment thereof, the defendant would suffer a loss in the amount of said payment. Said Interior Warehouse Company is therefore estopped to allege that the defendant did not make payment on said checks to the persons entitled thereto in conformity with the order of said Interior Warehouse Company.

THIRD FURTHER AND SEPARATE
ANSWER AND DEFENSE PRO TANTO.

Comes now the defendant, and for its third further [25] and separate answer and defense pro tanto, alleges:

I, II, III and IV

Paragraphs I, II, III and IV of the defendant's first further and separate answer and defense are here referred to and by reference thereto incorporated herein as fully as if set out in haec verba.

V.

The plaintiffs in the above entitled cause commenced the instant action on the 11th day of January, 1940, in which they seek to recover from the defendant certain funds alleged to have been wrongfully and tortiously converted from the deposit maintained with the defendant by said Interior Warehouse Company.

VI.

The following checks, if any or all of them existed and were drawn on the defendant by said Interior

Warehouse Company, upon the payment of which out of funds of the said Interior Warehouse Company the plaintiffs base their claim, were paid by the defendant and charged to the account of the said Interior Warehouse Company more than two years prior to the commencement of this action:

Date of Issue	Check Number	Name of Payee	Amount
Dec. 23, 1937	1950	C. W. Carey	\$ 35.64
Dec. 16, 1937	1925	C. W. Carey	37.15
Dec. 10, 1937	1871	C. W. Carey	31.60
Dec. 3, 1937	1807	C. W. Carey	41.58
Nov. 18, 1937	1625	C. W. Carey	50.54
Nov. 11, 1937	1532	C. W. Carey	30.79
Nov. 4, 1937	1479	C. W. Carey	33.66
Oct. 28, 1937	1369	C. W. Carey	35.64
Oct. 21, 1937	1344	C. W. Carey	34.38
June 24, 1937	713	B. Stewart	30.94
Nov. 15, 1936	B15889	R. Mcayéal	41.66
Dec. 31, 1935	B15007	J. Moore	30.00
July 23, 1937	811	F. Franz	15.05
July 23, 1937	792	A. Stoutenburg	40.99
July 1, 1937	723	R. P. Rawls	31.98
May 20, 1937	617	A. Stoutenburg	42.12
[26]			
Apr. 22, 1937	505	W. H. Hemming	33.62
Oct. 29, 1936	B15857	J. Fenton	24.30
Oct. 22, 1936	B15816	R. McAyeal	52.95
Sept. 17, 1936	B15670	A. Wright	31.20
Sept. 10, 1936	B15620	E. Foss	24.00
Dec. 15, 1937	1909	J. A. Frischknecht	49.50
Dec. 6, 1937	1845	P. Henning	60.00
Nov. 15, 1937	1612	J. A. Frischknecht	49.50
Nov. 1, 1937	1453	C. C. Elledge	74.25
Oct. 4, 1937	1243	Roy Lamb	88.70
Sept. 30, 1937	1255	C. G. Starr	74.25
Sept. 15, 1937	1140	J. A. Frischknecht	49.50
Sept. 3, 1937	1118	C. C. Elledge	74.25
Aug. 14, 1937	942	J. A. Frischknecht	49.50

Date of Issue	Check Number	Name of Payee	Amount
Aug. 4, 1937	860	C. G. Starr	74.25
July 15, 1937	765	J. A. Frischknecht	49.50
July 2, 1937	742	W. C. Bumgarner	123.75
June 3, 1937	657	Roy Lamb	79.20
May 4, 1937	575	Roy Lamb	49.20
May 3, 1937	549	C. C. Elledge	74.25
April 1, 1937	429	Roy Lamb	79.20
Mar. 3, 1937	139	Roy Lamb	79.20
Feb. 2, 1937	A10753	Roy Lamb	79.20
May 4, 1937	575	J. A. Frischknecht	50.00
Nov. 3, 1936	A10598	P. Henning	60.00
Oct. 15, 1936	A10552	J. A. Frischknecht	50.00
Oct. 3, 1936	A10547	C. C. Elledge	74.25
Sept. 15, 1936	A10479	J. A. Frischknecht	50.00
Jan. 3, 1938	2035	Roy Lamb	84.15
Sept. 2, 1937	1064	L. G. Speck	80.19
Aug. 3, 1937	849	M. Fennimore	59.40
Sept. 3, 1936	A10451	E. J. Ricker	70.09
Oct. 2, 1935	A9880	M. N. Mellick	20.00
Oct. 2, 1935	A9879	Ed Mellick	20.00
Oct. 2, 1935	A9878	N. A. Campbell	28.80
Dec. 10, 1936	B15920	W. H. Hemming	25.50
Dec. 1, 1936	A10622	Roy Lamb	80.00
Aug. 27, 1936	B15566	F. N. Alexander	43.20
Aug. 3, 1936	A10346	J. A. Frischknecht	50.00
July 9, 1936	B15367	A. Rieman	14.40
July 3, 1936	A10323	P. Henning	49.50
July 1, 1936	A10292	Roy Lamb	19.50
June 18, 1936	B15340	G. Edmonson	14.40
May 1936	A10230	—	49.50
Sept. 30, 1937	81	Frank D. Hatcher	23.86
Sept. 30, 1936	A10485	Frank Hatcher	24.91
Jan. 4, 1937	A10689	R. W. Umbarger	7.60

Wherefore, the defendants having fully answered the plaintiffs' complaint herein pray that the plaintiffs take nothing hereby and that the same be dismissed, and that the defendant recover of and from

the plaintiffs its costs and [27] disbursements herein incurred.

McCAMANT, THOMPSON,
KING & WOOD,
BORDEN WOOD,

Attorneys for Defendant.

Address: 926 American Bank Building,
Portland, Oregon.

[Endorsed]: Filed May 3, 1940. [28]

And afterwards, to wit, on Wednesday, the 26th day of March, 1941, the same being the 21st Judicial day of the Regular March 1941 Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [29]

[Title of District Court and Cause.]

PRE-TRIAL ORDER

This matter coming on for pre-trial conference before the Honorable James Alger Fee, judge of the above entitled court, at 3:45 p.m., on the 9th day of October, 1940, the plaintiffs appearing by Messrs. Plowden Stott, Nicholas Jaureguy and Randall S. Jones, and the defendant appearing by E. F. Munly, one of its assistant managers, and Mr. Borden Wood, its attorney, whereupon the following proceedings were had:

I.

The following pre-trial exhibits were introduced by plaintiff:

#1. One hundred seven (107) original canceled checks drawn on defendant, dated from October 2, 1935 to April 21, 1939, and which may be admitted without further identification.

#1A. Photostatic copies of a portion of said checks, subject to defendant's right to check the same against the originals, which photostatic copies may be admitted in lieu of the originals.

#1B. Photostatic copies of the remainder of said checks, subject to defendant's right to check the same against the originals, which photostatic copies may be admitted in lieu of the originals. [30]

#2. Carbon copies of nineteen (19) checks, subject to the objection that they are not the best evidence, are incompetent, irrelevant, and immaterial and that if defendant should purchase these checks it would be entitled to delivery and possession of the originals. Defendant refused to admit authentication or identification of these copies.

#3. Audit by Price, Waterhouse & Company, admitted by defendant to be the original of such audit without further identification, subject, however, to any and all legal objections to any statement, matter or thing therein contained where the same is or are not supported at the trial by bank statements, original

documents or legally admissible testimony to be produced or supplied by plaintiffs.

#4. Written memorandum bearing date 5-23-39, signed "G. L. Crowe", subject to defendant's objection on the ground of incompetency, irrelevancy and immateriality. Defendant refused to admit that the signature thereon was that of G. L. Crowe.

#5. Statement dated May 3, 1939, signed "G. L. Crowe," subject to defendant's objection on the ground of incompetency, irrelevancy and immateriality. Defendant refused to admit that the signature thereon was that of G. L. Crowe.

#6. Tabulation headed "Interior Warehouse Company, checks discovered by P. W. & Co. and listed by Mr. G. L. Crowe as being improper payments," dated 5-2-39, subject to defendant's objection on the ground of incompetency, irrelevancy and immateriality. Defendant refused to admit that the initialing or signature thereon was that of G. L. Crowe.

#7. Policy, American Surety Company of New York, dated July 1, 1931 (with leave to substitute a photostatic copy), admitted by defendant to be the original without further identification, subject to defendant's objection on the ground of immateriality and incompetency.

#8. Lloyd's policy N-36882, admitted by defendant to be the original without further identification, subject to defendant's objection on

the ground of immateriality and incompetency.

#9. Photostatic copy of Lloyd's policy N-44987, defendant admitting authenticity but reserving the right to object on the ground of immateriality and incompetency.

#10. Claim of Balfour, Guthrie & Co., Ltd., on American Surety Company of New York dated May 31, 1939, defendant admitting authenticity but reserving the right to object on the ground of immateriality, irrelevancy and incompetency. [31]

#11. Carbon copy of claim of Balfour, Guthrie & Co., Ltd. on Lloyd's of London dated May 31, 1939, defendant admitting authenticity and waiving objection that the original was not produced, but reserving the right to object on the ground of irrelevancy, incompetency and immateriality.

#12. Check dated Aug. 3, 1939, No. U-6124, Durham & Bates to Balfour, Guthrie & Co., Ltd., admittedly issued by the insurers under Exhibits 8 and 9, defendant admitting authenticity but reserving the right to object on the ground of irrelevancy, incompetency and immateriality.

#13. Check dated Aug. 4, 1939, No. U-6126, Durham & Bates to Balfour, Guthrie & Co., Ltd., admittedly issued by the insurers under Exhibits 8 and 9, defendant admitting authenticity but reserving the right to object on the ground of irrelevancy, incompetency and immateriality.

#13A. Check dated June 7, 1939, #21175, American Surety Company of New York to Balfour, Guthrie & Co., Ltd. defendant admitting authenticity but reserving the right to object on the ground of irrelevancy, incompetency and immateriality.

#14. Assignment, Lloyd's of London to E. L. McDougal, executed Oct. 25, 1939, defendant admitting authenticity but reserving the right to object on the ground of irrelevancy, incompetency and immateriality.

#15. Copy of page 32, Cash Receipts, August, 1939, defendant admitting authenticity and waiving objection that the original was not produced but reserving the right to object on the ground of immateriality, incompetency and irrelevancy.

#16. Copy of page 33, Cash Receipts, Aug. 5, 1939, defendant admitting authenticity and waiving objection that the original was not produced but reserving the right to object on the ground of irrelevancy, incompetency and immateriality.

#17. Copy of tabulation headed "Balfour, Guthrie & Co., Ltd., Portland, Oregon, Cash Received," dated June 8, 1939, defendant admitting authenticity and waiving objection that the original was not produced, but reserving the right to object on the ground of irrelevancy, incompetency and immateriality.

#18. Printed document bearing heading

“The Bank of California National Association, San Francisco, Statement of Condition, including its branches in San Francisco, Portland, Seattle, Tacoma, as of October 2, 1939” (excluding the financial statement thereon, which is inadmissible), defendant admitting authenticity but reserving the right to object on the ground of irrelevancy, incompetency and immateriality. [32]

II.

The following pre-trial exhibits were introduced by defendant, subject to plaintiffs' right to object to any of them on the ground of incompetency, irrelevancy and immateriality (the reporter is directed to mark the same, respectively, as follows):

The following books, records and documents of Interior Warehouse Company and/or Balfour, Guthrie & Co., Ltd.:

- #19. Ledger.
- #20. Journal.
- #21. Country pay roll sheets.
- #22. Dock pay roll sheets (three separate sets).
- #23. Dock time books (four books).
- #24. Bank statements and cancelled pay checks covering period of time from January, 1935, to June, 1939.
- #25. Dock pay roll sheets, January, 1935, to February, 1936.
- #26. Duplicate pay roll checks covering period of time from February 15, 1937, to December 31, 1938.

- #27. Expense reports made out by country agents.
- #28. Carbon copies of checks: two separate groups, one for dock employees, one for country employees, covers period of time from January 1, 1935, to December 1, 1937.
- #29. Duplicate checks from January, 1939, to June 30, 1939.
- #30. Pay roll and expense summaries. Covers period of time from January, 1935, to June, 1939.
- #31. Original drafts which have been cancelled; drawn by country agents, covering period of time from January, 1935, to June, 1939.
- #32. Duplicate expense checks.
- #33. Expense statements and vouchers.
- #34. Duplicate pay roll records of the country pay roll.
- #35. Bank of California deposit book issued to Interior Warehouse Co. [33]

III.

Plaintiffs and defendant agreed that, so far as they may be material at the trial, the allegations in the affidavit of E. F. Munly sworn to Feb. 1, 1940, and the affidavit of Randall S. Jones sworn to Feb. 26, 1940, both filed in connection with defendant's motion on file herein, are admitted to be true.

IV.

Defendant's motion on file herein has not been allowed or overruled, either in whole or in part.

The court is to later determine how and what time the motion is to be disposed of.

V.

(a) Defendant admitted the allegations of paragraph I of the complaint, which alleges as follows:

“During all of the times hereinafter mentioned, plaintiff American Surety Company of New York, was and now is a corporation organized and existing under and by virtue of the laws of the State of New York, with its home office and principal place of business in the City of New York, State of New York, and it is a resident and citizen of the State of New York and now is and at all times hereinafter mentioned was engaged in the business of writing surety and other bonds.”

(b) Defendant admitted the allegations of Paragraph II of the complaint, which alleges as follows:

“Plaintiff, E. L. McDougal is a citizen and resident of the State of Oregon.”

(c) Defendant admitted the allegations of Paragraph III of the complaint, which alleges as follows:

“During all of the times hereinafter mentioned defendant, The Bank of California, National Association, was and now is a national banking association incorporated under the laws of the United States with its home office and principal place of business in the City of San Francisco, state of California, and with

a branch bank in Portland, Oregon, and is doing business in the State of Oregon.” [34]

(d) Defendant admitted the allegations of paragraph IV of the complaint, which alleges as follows:

“During all of the times hereinafter mentioned, Interior Warehouse Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Oregon, with its principal place of business in the City of Portland, State of Oregon.”

(e) Defendant admitted that the matter in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.

(f) Defendant admitted the allegations of paragraph VI of the complaint, which alleges as follows:

“That between September 1, 1935, and May 2, 1939, and during all times herein mentioned, the Interior Warehouse Company, a corporation, was a depositor in the defendant’s branch bank in the City of Portland, Oregon, and during all the said times maintained a deposit and checking account and had deposited with defendant bank to the credit of said account funds in excess of the amounts hereinafter set forth, and there existed a credit in its favor for the money it had deposited with the defendant.”

(g) As to paragraphs VII and VIII, defendant paid the amount specified in each of one hundred

twenty-six (126) separate checks made payable to various payees and charged the amount thereof against the deposit account of the Interior Warehouse Company, a corporation, as listed and set forth in said Paragraph VIII, saving and excepting the following such checks:

Date of Issue	Check Number	Name of Payee	Amount
Dec. 5, 1938	4016	C. C. Elledge	\$ 99.00
Dec. 2, 1938	4004	Ed. Thorpe	76.03
Dec. 2, 1938	4003	Dick Sperry	11.09
Dec. 1, 1938	3965	Roy Lamb	89.10
Nov. 2, 1938	3762	Dick Sperry	34.16
Nov. 2, 1938	3761	Kemper Snow	87.12
Nov. 2, 1938	3760	Ed Thorpe	120.78
Aug. 31, 1938	3499	J. W. Bradley	17.82
Aug. 31, 1938	3496	John Klamart	8.91
Aug. 31, 1938	3483	John Klamart	60.38
Dec. 10, 1936	B15920	W. H. Hemming	25.50
Dec. 1, 1936	A10622	Roy Lamb	80.00
Aug. 27, 1936	B15566	F. N. Alexander	43.20
Aug. 3, 1936	A10346	J. A. Frischknecht	50.00
July 9, 1936	B15367	A. Rieman	14.40
July 3, 1936	A10323	P. Henning	49.50
July 1, 1936	A10292	Roy Lamb	19.50
June 18, 1936	B15340	G. Edmonson	14.40
May 1936	A10230	—	49.50

[35]

(h) As to paragraph X (erroneously numbered XI) of plaintiffs' complaint, defendant admitted:

That said Interior Warehouse Company and plaintiffs on or about October 16, 1939, notified the defendant of payments alleged by them to have been wrongful and tendered said checks to defendant, saving and excepting the nineteen (19) checks specifically described in subparagraph (g) supra, and demanded payment of

the several amounts of all of said checks, including said nineteen (19) checks, and that defendant refused to pay to said Interior Warehouse Company or to the plaintiffs herein the sum of \$6,562.33. [36]

(i) Defendant denied each and every remaining allegation contained in the complaint, thus making the issues hereafter specified.

(j) Defendant admitted that Interior Warehouse Company is a subsidiary of Balfour, Guthrie & Co., Ltd., and wholly owned by the latter.

(k) Defendant agreed that proofs of loss by and payments to Balfour, Guthrie & Co., Ltd., should be considered as proofs by and payments to Interior Warehouse Company.

VI.

(a) Plaintiffs did not admit any of the allegations of the first, second or third further and separate answers and defenses contained in defendant's answer, thus making the issues hereafter specified.

(b) Plaintiffs objected to a jury trial in this case, contending that their case is based on subrogation, defendant contending that it is based on assignments.

VII.

The following issues remain for determination at or prior to trial:

1. Whether or not this court has jurisdiction of this cause:

(a) Whether diversity of citizenship exists between plaintiff E. L. McDougal and defen-

dant, and existed at the commencement of this action.

(b) Whether the court lacks jurisdiction of an alleged claim of American Surety Company, defendant asserting that said claim is separable and less than \$3000. in amount.

2. Whether defendant's motion to dismiss, on the ground that the complaint fails to state claims or a claim against defendant upon which relief can be granted, should be allowed or disallowed.

3. Whether or not there are any legal issues in this case [37] which should be submitted to a jury.

4. Whether between the dates of September 1, 1935, and May 2, 1939, defendant wrongfully charged and deducted from the deposits in the checking account of Interior Warehouse Company the sum of \$6,562.33; whether defendant paid checks aggregating that amount and specified in the complaint and charged the same against the said checking account.

5. Whether in paying said amounts defendant followed or did not follow any directions or authorization of the Interior Warehouse Company.

6. Whether defendant paid any such amounts to any lawful holder or owner of any of said checks.

7. Whether the endorsement of each payee of said checks was forged, and whether said payees, or any of them, authorized payment to be made on their respective checks.

8. Whether Interior Warehouse Company had a policy of insurance with the Underwriters at

Lloyd's of London by which it was entitled to and did receive from the latter the sum of \$5,562.33 of said \$6,562.33.

9. Whether Interior Warehouse Company had a policy of insurance with American Surety Company of New York by which it was entitled to and did receive from the latter the sum of \$1,000 of said \$6,562.33.

10. Whether defendant became indebted to Interior Warehouse Company in said sum of \$6,562.33.

11. Whether within a reasonable time after payment of said checks, or any of them, or within a reasonable time of knowledge thereof by Interior Warehouse Company, the latter and plaintiffs on or about May 16, 1939, notified defendant making claim that payment on the said checks was wrongful.

12. If said notification or notifications, if any, were not given within a reasonable time, whether the defendant was prejudiced or injured thereby, and if so to what extent. [38]

13. Whether under (a) the provisions of the policies of insurance referred to herein, (b) any rules of law or equity, or (c) any separate assignments, the Interior Warehouse Company assigned to the Underwriters of Lloyds of London (and by them assigned to the plaintiff, E. L. McDougal) and the American Surety Company of New York, respectively, the rights of the Interior Warehouse Company to recover from the defendant the amount of the alleged loss paid under the respective policies and which amounts are now claimed against

the defendant, or under and by virtue of which policies, rules of law, or equity or assignments, the said Underwriters of Lloyds of London (and through them the said E. L. McDougal) and the American Surety Company of New York, respectively, became subrogated to such rights of the Interior Warehouse Company; the defendant claiming that the complaint herein is based upon assignments only, and the plaintiffs claiming the allegations of the complaint broad enough to cover alleged rights of subrogation.

14. Whether prior to the commencement of this action the Underwriters at Lloyd's of London assigned its said claim to plaintiff, E. L. McDougal.

15. Whether defendant owes plaintiff, E. L. McDougal, the sum of \$5,562.33, or any other sum, with interest at the legal rate from October 16, 1939, or any other date, on account of the matters and things herein and in the complaint specified.

16. Whether defendant owes plaintiff, American Surety Company of New York, the sum of \$1,000, or any other sum, with interest thereon at the legal rate from October 16, 1939, or any other date, on account of the matters and things herein and in the complaint specified.

17. Whether between September 1, 1935, and May 2, 1939, defendant paid said checks out of the account of the Interior Warehouse Company upon due presentation of said checks to defendant in the regular course of business when and as directed by Interior [39] Warehouse Company and upon its order.

18. Whether defendant rendered to Interior Warehouse Company on or about the first of every month during the times above mentioned a bank statement of the latter's account with the defendant, together with all the canceled checks of the Interior Warehouse Company drawn against its deposit with defendant.

19. Whether or not a reasonably careful examination of said statements and canceled checks would have disclosed irregularities and discrepancies, if any existed, in the preparation and issuance of Interior Warehouse Company checks.

20. Whether Interior Warehouse Company had notice of any such alleged irregularities and discrepancies at the time of the preparation and issuance of its checks, or at the time of the cashing of the same by defendant.

21. Whether any of said checks bore the forged endorsement of the payee thereon, and if so, (a) whether the Interior Warehouse Company was negligent in failing and refusing to adopt and maintain in operation in its business a system of bookkeeping and accounting reasonably necessary to safeguard itself and defendant from fraudulent acts of agents and employees of Interior Warehouse Company, and in failing and refusing to make a careful investigation into the condition of its books, records and statements, and the conduct of its employees, (b) whether such negligence, if any, was the proximate cause of the defendant paying any such checks bearing forged endorsements, and (c) whether the Interior Warehouse Company negligently failed and

refused to notify defendant within a reasonable time after it knew or should have known of the fraudulent acts, if any, or its agents and employees in forging the payees' endorsements upon checks drawn by Interior Warehouse Company upon defendant, if any of said endorsements were so forged, and (d) whether such negligence, if any, was the proximate cause of the defendant paying any such checks bearing forged endorsements. [40]

22. Whether Interior Warehouse Company drew checks on its account with defendant payable to fictitious and non-existent persons known to Interior Warehouse Company to be fictitious and non-existent and who neither were nor at any time had been in its employ, and in doing so represented to defendant that the named payees were existent persons in the employ of Interior Warehouse Company, and whether such representations, if any, were false and misleading, and that Interior Warehouse Company knew or by reasonable care should have known that they were false and misleading, and that it intended that defendant rely upon such representations, if any, and whether defendant did or did not know that the payees named in the checks were non-existent and fictitious, if they were, and whether defendant could have ascertained that the representations were false and misleading, if they were, and whether such representations, if any, were relied upon by defendant, and whether such reliance increased defendant's risk in making payment upon such checks.

23. Whether Interior Warehouse Company and

plaintiffs are estopped to allege or claim that defendant did not make payment on said checks or any of them, to the persons entitled thereto in conformity with the order of Interior Warehouse Company.

Excepting, however, the plaintiffs do not regard the issues stated in paragraphs 11, 12, 18, 19, and 20 and 21 of Article VII as material in this case, and plaintiffs take the position that paragraph 4 of said article should end with the figures "\$6562.33" in line 31 on page 7 of this order, and that the substance of paragraphs 5, 6, 7, 10 and 17, are all embraced in paragraph 4 and should not be otherwise separately stated; that the substance of paragraphs 14, 15, and 16 are all embraced in paragraph 13 and should not be otherwise separately stated; that points (c) and (d) of paragraph 21 are embraced in paragraph 12 and should not be [41] separately stated, and that paragraph 22 should end with the word "non-existent" in line 3 on page 11.

Dated this 26th day of March, 1941.

JAMES ALGER FEE.

Approved:

RANDALL S. JONES,
PLOWDEN STOTT,
CAKE, JAUREGUY & TOOZE,

Attorneys for Plaintiffs.

McCAMANT, KING & WOOD,
BORDEN WOOD,

Attorneys for Defendant.

[Endorsed]: Filed March 26, 1941. [42]

And afterwards, to wit, on Tuesday, the 20th day of January, 1942, the same being the 67th Judicial day of the Regular November 1941 Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

[43]

[Title of District Court and Cause.]

ORDER OVERRULING MOTION

This matter coming on to be heard on defendant's motion for dismissal of the above-entitled and numbered cause and for other relief, plaintiff E. L. McDougal appearing in person and by his attorneys Randall S. Jones, Nicholas Jaureguy, Plowden Stott and Maurice D. Sussman, plaintiff American Surety Company of New York appearing by the same attorneys, and defendant appearing by Borden Wood and Robert S. Miller, of its attorneys, and the court having heard the arguments and considered the briefs of respective counsel for and against said motion and deeming itself advised in the premises, it is hereby

Considered, ordered and adjudged that the said motion be, and the same hereby is, in all respects overruled.

Dated: January 20th, 1942.

JAMES ALGER FEE,
Judge.

[Endorsed]: Filed January 20, 1942. [44]

And afterwards, to wit, on the 20th day of January, 1942, there was duly filed in said Court, Findings of Fact and Conclusions of Law, in words and figures as follows, to wit: [45]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled and numbered cause came on for trial before the court sitting without the intervention of a jury on March 25, 1941, and continued through March 26, 1941, and March 27, 1941, plaintiff E. L. McDougal appearing in person and by his attorneys Randall S. Jones, Nicholas Jaureguy, Plowden Stott and Maurice D. Sussman, plaintiff American Surety Company of New York appearing by the same attorneys and defendant appearing by Borden Wood and Robert S. Miller, of its attorneys, the court having heard the arguments and considered the briefs of respective counsel for and against defendant's motion for dismissal of said cause and for other relief, each party hereto introduced his and its evidence and rested, and the court having considered the briefs of respective counsel and deeming itself advised in the premises, makes the following

FINDINGS OF FACT

I.

On and prior to September 1, 1935, and continuously since that time, plaintiff E. L. McDougal was and is a citizen and resident of the State of

Oregon; plaintiff American Surety [46] Company of New York was and is a corporation organized and existing under and by virtue of the laws of the State of New York and a citizen and resident of the State of New York; Interior Warehouse Company was and is a corporation organized and existing under and by virtue of the laws of the State of Oregon and a citizen and resident of the State of Oregon; and defendant was and is a national banking association incorporated under the laws of the United States of America with its home office and principal place of business in the State of California, with a branch bank in the State of Oregon which is, and during all of said times was, doing business in the City of Portland, State of Oregon.

II

There is, and during all of said times, including the institution of this cause, was, a diversity of citizenship between the plaintiffs and the defendant.

III

The matter in controversy herein, exclusive of interest and costs, exceeds the sum or value of \$3,000.00.

IV

Between October 2, 1935, and May 1, 1939, said Interior Warehouse Company was a depositor in defendant's branch bank in Portland, Oregon, and during all of said times maintained a deposit and checking account and had deposited with defendant to the credit of said account funds in excess of the amounts hereinafter set forth.

V

Between said dates defendant cashed an aggregate

of one hundred seven (107) checks drawn on said account by said Interior Warehouse Company which checks respectively bore [47] the following respective numbers, dates, amounts and prior endorsements:

Number	Date	Amount	Endorsements
A9878	Oct. 2, 1935	\$28.80	N. A. Campbell DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon
A9879	Oct. 2, 1935	20.00	Ed Mellick Hallock Meier & Frank Co. First National Bank, Portland, Oregon
A9880	Oct. 2, 1935	20.00	M. N. Mellick (initial) Lipman, Wolfe & Co., Inc. First National Bank, Portland, Oregon
B15007	Dec. 31, 1935	30.00	J. Moore DeMent Meier & Frank Co. First National Bank, Portland, Oregon
A10451	Sep. 3, 1936	70.09	E. J. Ricker J. M. Criler Lipman, Wolfe & Co., Inc. First National Bank, Portland, Oregon
B15620	Sep. 10, 1936	24.00	E. Foss (initial) Lipman, Wolfe & Co., Inc. First National Bank, Portland, Oregon
A10479	Sep. 15, 1936	50.00	J. A. Frischknecht DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon

Number	Date	Amount	Endorsements
B15670	Sep. 17, 1936	\$31.20	A. Wright (initial) Lipman, Wolfe & Co., Inc. First National Bank, Portland, Oregon
A10485	Sep. 30, 1936	24.91	Frank Hatcher (initial) Lipman, Wolfe & Co., Inc. First National Bank, Portland, Oregon
A10547	Oct. 3, 1936	74.25	C. C. Elledge DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon
			[48]
A10552	Oct. 15, 1936	50.00	J. A. Frischknecht (initial) Lipman, Wolfe & Co., Inc. First National Bank, Portland, Oregon
B15816	Oct. 22, 1936	52.95	R. McAyeal (initial) Lipman, Wolfe & Co., Inc. First National Bank, Portland, Oregon
B15857	Oct. 29, 1936	24.30	J. Fenton DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon
A10598	Nov. 3, 1936	60.00	P. Henning DeMent Meier & Frank Co.
B15889	Nov. 15, 1936	41.66	R. McAyeal DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon

Number	Date	Amount	Endorsements
A10689	Jan. 4, 1937	\$ 7.60	R. W. Umbarger Hallock Meier & Frank Co. The United States National Bank, Portland, Oregon
A10680	Jan. 4, 1937	50.00	J. A. Frischknecht Marber Meier & Frank Co. First National Bank, Portland, Oregon
A10753	Feb. 2, 1937	79.20	Roy Lamb DeMent Meier & Frank Co.
139	Mar. 3, 1937	79.20	Roy Lamb Hallock Meier & Frank Co.
429	Apr. 1, 1937	79.20	Roy Lamb DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon
505	Apr. 22, 1937	33.62	W. H. Hemming Hallock Meier & Frank Co. First National Bank, Portland, Oregon
549	May 3, 1937	74.25	C. C. Elledge Hallock Meier & Frank Co. First National Bank, Portland, Oregon
575	May 4, 1937	49.20	Roy Lamb DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon
617	May 20, 1937	42.12	A. Stoutenburg DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon

Number	Date	Amount	Endorsements
657	June 3, 1937	\$79.20	Roy Lamb Hallock Meier & Frank Co. First National Bank, Portland, Oregon
713	June 24, 1937	30.94	B. Stewart Mayes Meier & Frank Co. First National Bank, Portland, Oregon
723	July 1, 1937	31.98	R. P. Rawls (initial) Lipman, Wolfe & Co., Inc. First National Bank, Portland, Oregon
742	July 2, 1937	123.75	W. C. Bumgarner (initial) Meier & Frank Co. First National Bank, Portland, Oregon
765	July 15, 1937	49.50	J. A. Frischknecht Hallock Meier & Frank Co. First National Bank, Portland, Oregon
792	July 23, 1937	40.99	A. Stoutenburg G. L. Crowe H. J. Guindon
811	July 23, 1937	15.05	F. Franz Hallock Meier & Frank Co. First National Bank, Portland, Oregon
849	Aug. 3, 1937	59.40	M. Fennimore (initial) Meier & Frank Co. The United States National Bank, Portland, Oregon

[50]

Number	Date	Amount	Endorsements
860	Aug. 4, 1937	\$74.25	C. G. Starr Hallock Meier & Frank Co. The United States National Bank, Portland, Oregon
942	Aug. 14, 1937	49.50	J. A. Frischknecht DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon
1064	Sep. 2, 1937	80.19	L. G. Speck DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon
1118	Sep. 3, 1937	74.25	C. C. Elledge DeMent Meier & Frank Co. First National Bank, Portland, Oregon
1140	Sep. 15, 1937	49.50	J. A. Frischknecht (initial) Meier & Frank Co.
1255	Sep. 30, 1937	74.25	C. G. Starr DeMent Meier & Frank Co. First National Bank, Portland, Oregon
81	Sep. 30, 1937	23.86	Frank D. Hatcher G. L. Crowe
1243	Oct. 4, 1937	88.70	Roy Lamb DeMent Meier & Frank Co. First National Bank, Portland, Oregon
1344	Oct. 21, 1937	34.38	C. W. Carey DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon

Number	Date	Amount	Endorsements
1369	Oct. 28, 1937	\$35.64	C. W. Carey DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon
1453	Nov. 1, 1937	74.25	C. C. Elledge DeMent Meier & Frank Co. First National Bank, Portland, Oregon
1479	Nov. 4, 1937	33.66	C. W. Carey DeMent Meier & Frank Co. First National Bank, Portland, Oregon
1532	Nov. 11, 1937	30.79	C. W. Carey DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon
1612	Nov. 15, 1937	49.50	J. A. Frischknecht DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon
1625	Nov. 18, 1937	50.54	C. W. Carey DeMent Meier & Frank Co. First National Bank, Portland, Oregon
1807	Dec. 3, 1937	41.58	C. W. Carey Kuhn Meier & Frank Co. First National Bank, Portland, Oregon
1845	Dec. 6, 1937	60.00	P. Henning Kuhn Meier & Frank Co. First National Bank, Portland, Oregon

[51]

Number	Date	Amount	Endorsements
1871	Dec. 10, 1937	\$31.60	C. W. Carey Kuhn Meier & Frank Co. First National Bank, Portland, Oregon
1909	Dec. 15, 1937	49.50	J. A. Frischknecht Kuhn Meier & Frank Co.
1925	Dec. 16, 1937	37.15	C. W. Carey Kuhn Meier & Frank Co. The United States National Bank, Portland, Oregon
			[52]
1950	Dec. 23, 1937	35.64	C. W. Carey Kuhn Meier & Frank Co. The United States National Bank, Portland, Oregon
2035	Jan. 3, 1938	84.15	Roy Lamb DeMent Meier & Frank Co. First National Bank, Portland, Oregon
2094	Jan. 13, 1938	31.98	A. R. Reed DeMent Meier & Frank Co. First National Bank, Portland, Oregon
2113	Jan. 15, 1938	49.50	J. A. Frischknecht DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon
2125	Jan. 20, 1938	37.97	C. W. Clark DeMent Meier & Frank Co. First National Bank, Portland, Oregon

Number	Date	Amount	Endorsements
2240	Feb. 1, 1938	\$25.24	Robt. Stilson (initial) Meier & Frank Co. The United States National Bank, Portland, Oregon
2259	Feb. 2, 1938	74.25	C. C. Elledge DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon
2292	Feb. 10, 1938	45.79	C. W. Clark (initial) Meier & Frank Co. First National Bank, Portland, Oregon
2330	Feb. 15, 1938	49.50	J. A. Frischknecht DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon
2337	Feb. 17, 1938	36.38	C. W. Clark Johnson Meier & Frank Co. First National Bank, Portland, Oregon
2473	Mar. 11, 1938	36.33	C. W. Clark DeMent Meier & Frank Co. First National Bank, Portland, Oregon
2586	Mar. 25, 1938	33.73	L. G. Cross DeMent Meier & Frank Co. First National Bank, Portland, Oregon
2687	Apr. 2, 1938	90.68	Ed Thorpe DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon

Number	Date	Amount	Endorsements
2701	Apr. 5, 1938	\$50.23	J. E. Flor DeMent Meier & Frank Co.
2728	Apr. 14, 1938	49.99	C. W. Clark DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon
2770	Apr. 21, 1938	36.66	C. W. Clark DeMent Meier & Frank Co. First National Bank, Portland, Oregon
2812	May 2, 1938	84.15	Roy Lamb DeMent Meier & Frank Co. First National Bank, Portland, Oregon
2852	May 13, 1938	29.70	C. W. Clark DeMent Meier & Frank Co. First National Bank, Portland, Oregon
2877	May 19, 1938	28.81	C. W. Clark (initial) Meier & Frank Co. The United States National Bank, Portland, Oregon
2886	May 27, 1938	28.84	C. W. Clark DeMent Meier & Frank Co. First National Bank, Portland, Oregon
2920	June 1, 1938	84.15	Roy Lamb DeMent Meier & Frank Co.
2944	June 3, 1938	74.25	C. C. Elledge DeMent Meier & Frank Co. First National Bank, Portland, Oregon

The Bank of California

55

Number	Date	Amount	Endorsements
2978	June 9, 1938	\$33.86	C. W. Clark DeMent Meier & Frank Co. First National Bank, Portland, Oregon
3039	June 23, 1938	33.24	C. W. Clark Johnson Meier & Frank Co. First National Bank, Portland, Oregon
3059	June 30, 1938	42.17	C. W. Clark DeMent Meier & Frank Co. First National Bank, Portland, Oregon
3126	July 5, 1938	50.00	F. A. Darnielle DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon
3156	July 14, 1938	49.50	J. A. Frischknecht DeMent Meier & Frank Co. First National Bank, Portland, Oregon
3184	July 22, 1938	34.15	C. W. Clark DeMent Meier & Frank Co. First National Bank, Portland, Oregon
3264	Aug. 2, 1938	123.75	Ed Thorpe Hallock Meier & Frank Co. The United States National Bank, Portland, Oregon
3266	Aug. 2, 1938	33.66	Kemper Snow G. L. Crowe Bernice Bouman The United States National Bank, Portland, Oregon

Number	Date	Amount	Endorsements
3265	Aug. 2, 1938	\$123.75	Joe Green G. L. Crowe Cranning & Treece First National Bank, Portland, Oregon
3373	Aug. 15, 1938	49.50	J. A. Frischknecht DeMent Meier & Frank Co. First National Bank, Portland, Oregon
3383	Aug. 19, 1938	51.97	C. W. Clark DeMent Meier & Frank Co. First National Bank, Portland, Oregon
3423	Aug. 26, 1938	47.77	C. W. Clark Hallock Meier & Frank Co. First National Bank, Portland, Oregon
3461	Sep. 1, 1938	42.57	C. W. Clark DeMent Meier & Frank Co. First National Bank, Portland, Oregon
3511	Sep. 6, 1938	130.68	C. H. Peters G. L. Crowe Granning & Treece First National Bank, Portland, Oregon
3512	Sep. 6, 1938	56.43	Fred Mutt G. R. Crowe Bernice Bouman The United States National Bank, Portland, Oregon
3536	Sep. 8, 1938	46.78	C. W. Clark DeMent Meier & Frank Co. First National Bank, Portland, Oregon

Number	Date	Amount	Endorsements
3650	Oct. 3, 1938	\$78.41	M. Fennimore DeMent Meier & Frank Co. First National Bank, Portland, Oregon
3691	Oct. 15, 1938	49.50	J. A. Frischknecht DeMent Meier & Frank Co. First National Bank, Portland, Oregon
3698	Oct. 21, 1938	30.63	W. H. Hemming DeMent Meier & Frank Co.
3749	Nov. 1, 1938	89.10	Roy Lamb DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon
3895	Nov. 14, 1938	49.50	J. A. Frischknecht Hallock Meier & Frank Co. First National Bank, Portland, Oregon
4223	Jan. 4, 1939	82.37	Ed Thorpe DeMent Meier & Frank Co.
560	Jan. 6, 1939	40.11	W. C. Bumgarner G. L. Crowe Jay Stine First National Bank, Portland, Oregon
4233	Jan. 6, 1939	128.70	W. C. Bumgarner G. L. Crowe Granning & Treece First National Bank, Portland, Oregon
4339	Jan. 27, 1939	42.75	W. B. Farthing DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon

[56]

Number	Date	Amount	Endorsements
4408	Feb. 2, 1939	\$4.75	Dick Sperry Garth Crowe Bernice Bouman The United States National Bank, Portland, Oregon
4408	Feb. 2, 1939	79.20	Ed Thorpe DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon
4653	Feb. 24, 1939	42.00	C. Clarkson DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon
4724	Mar. 3, 1939	76.03	Ed Thorpe Hallock Meier & Frank Co. First National Bank, Portland, Oregon
4725	Mar. 3, 1939	31.68	Henry Robertson DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon
4726	Mar. 3, 1939	28.51	Dick Sperry DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon
4996	Apr. 3, 1939	99.00	C. C. Elledge DeMent Meier & Frank Co. First National Bank, Portland, Oregon
5117	Apr. 21, 1939	41.55	C. Warren Hallock Meier & Frank Co. First National Bank, Portland, Oregon

[57]

Each of said checks was negotiated and cashed by Garth L. Crowe, payroll clerk in the employ of said Interior Warehouse Company at the respective times of the drawing and cashing of said checks, by his endorsement of the names of the respective payees on the backs of said checks, the names of such respective payees being those first to appear under the above heading "Endorsements." The originals of all of the above checks were introduced in evidence.

VI.

Plaintiffs also proffered carbon copies of eighteen (18) checks allegedly drawn on said account by said Interior Warehouse Company which carbon copies bore the following respective numbers, dates, amounts and names of payees:

<u>Number</u>	<u>Date</u>	<u>Amount</u>	<u>Payee</u>
B15340	June 18, 1936.....	\$ 14.40	G. Edmonson
A10292	July 1, 1936.....	19.50	Roy Lamb
A10323	July 3, 1936.....	49.50	P. Henning
B15367	July 9, 1936.....	14.40	A. Rieman
[58]			
A10346	Aug. 3, 1936.....	50.00	J. A. Frischknecht
B15566	Aug. 27, 1936.....	43.20	F. N. Alexander
A10622	Dec. 1, 1936.....	80.00	Roy Lamb
B15920	Dec. 10, 1936.....	25.50	W. H. Hemming
3483	Aug. 31, 1938.....	60.38	John Klamert
3496	Aug. 31, 1938.....	8.91	John Klamert
3499	Aug. 31, 1938.....	17.82	J. W. Bradley
3760	Nov. 2, 1938.....	120.78	Ed. Thorpe
3761	Nov. 2, 1938.....	87.12	Kemper Snow
3762	Nov. 2, 1938.....	34.16	Dick Sperry
3965	Dec. 1, 1938.....	89.10	Roy Lamb
4003	Dec. 2, 1938.....	11.09	Dick Sperry
4004	Dec. 2, 1938.....	76.03	Ed. Thorpe
4016	Dec. 5, 1938.....	99.00	C. C. Elledge

Plaintiffs also attempted to prove check number A10230 dated May, 1936, in the amount of \$49.50, but the carbon copy of the same was not produced.

The originals of none of said nineteen (19) checks were produced or offered in evidence and there is no evidence of any of the endorsements on the back thereof, if any, other than the oral testimony of Garth L. Crowe that he endorsed the names of said respective payees on the several checks.

VII.

Each and all of said checks aggregating one hundred twenty-six (126) in number and aggregating \$6,562.33 in amount were forged by the said Garth L. Crowe in that he himself wrongfully endorsed the names of the respective payees of said checks on the backs thereof without any authorization therefor and negotiated and cashed the same and received the money therefor. [59]

VIII.

An aggregate of sixty-three (63) of said checks aggregating in amount \$3,996.53 represented payments to country employees of Interior Warehouse Company who previously had been or subsequently were paid by said company by other means.

An aggregate of twenty-one (21) of said checks aggregating \$812.24 in amount represented payments to fictitious persons who never were authentic employees of said Interior Warehouse Company.

An aggregate of twelve (12) of said checks aggre-

gating \$433.58 in amount represented payments to existing persons who previously had been, but no longer were, authentic employees of said Interior Warehouse Company and who had previously been paid by said company for their services.

The nineteen (19) checks referred to in Paragraph VI hereof aggregating \$950.39 in amount represented payments to employees of said Interior Warehouse Company who previously had been or later were paid by said company by other means.

An aggregate of eleven (11) of said checks aggregating \$369.59 in amount represented payments to Portland, Oregon dock employees of said Interior Warehouse Company who previously had been or later were paid by said company by other means.

IX.

During the entire period of the said negotiation and cashing of said checks by said Garth L. Crowe and in order to account for the same on the books and records of said Interior Warehouse Company, he made irregular and improper entries therein by the following methods:

(a) Increasing dock and country payrolls by adding names and amounts thereto.

(b) Recording in the monthly summary sheet a larger amount than the dock payroll actually showed. [60]

(c) Raising amounts properly due employees.

(d) Charging labor, repairs, insurance or other expense accounts without proper support,

the contra entries being to accounts payable to which irregular disbursements had been charged.

(e) Making direct entries in the ledger without support in a book of original entry.

X.

Regularly at the beginning of each month during the said period of the cashing of said checks by said Crowe, defendant returned to Interior Warehouse Company all of said checks which had been cashed during the previous month, together with defendant's statement showing the cashing of said checks and the then condition of said Interior Warehouse Company's account in defendant bank.

Said Interior Warehouse Company usually permitted said Crowe to accept delivery of said cancelled checks and statements and to check and examine the same in its behalf.

XI.

Said Interior Warehouse Company and plaintiffs on or about October 16, 1939, notified defendant of their claim that payment of said checks by defendant was wrongful, tendered to defendant the one hundred seven (107) checks specified in Paragraph V hereof, and demanded payment of said checks, together with payment of the checks specified in Paragraph VI hereof. Defendant refused to comply with said demand.

XII.

During all of the times herein mentioned, said Interior Warehouse Company had a policy of insur-

ance with the Underwriters at Lloyd's of London by and in which the employees of Interior Warehouse Company, including said Crowe, were bonded and Interior Warehouse Company insured against loss it might [61] sustain by reason of infidelity or dishonesty of any of said employees, including said Crowe. Said policy of insurance was executed and delivered to Interior Warehouse Company in consideration of a premium paid by it therefor to said insurer.

Following the cashing of said checks by said Crowe the Underwriters at Lloyd's of London paid Interior Warehouse Company the sum of \$5,562.33 as and for a loss under said policy of insurance because of the cashing of said checks aggregating that amount by said Crowe. Thereafter Interior Warehouse Company assigned to Underwriters at Lloyd's of London, Interior Warehouse Company's alleged claim against defendant for cashing a number of said checks aggregating \$5,562.33 in amount, and subsequently Underwriters at Lloyd's of London assigned said alleged claim to plaintiff E. L. McDougal.

XIII

During all of the times herein mentioned said Interior Warehouse Company had a policy of insurance with plaintiff American Surety Company of New York by and in which the employees of Interior Warehouse Company, including said Crowe, were bonded and Interior Warehouse Company insured against loss it might sustain by reason of

fraud, dishonesty, forgery, theft, embezzlement, wrongful abstraction or willful misapplication of any of said employees, including said Crowe. Said policy of insurance was executed and delivered to Interior Warehouse Company in consideration of a premium paid by it therefor to said insurer.

Following the cashing of said checks by said Crowe said plaintiff paid Interior Warehouse Company the sum of \$1,000.00 as and for a loss under said policy of insurance because of the cashing of said checks aggregating that amount by said Crowe. [62]

XIV

Said Interior Warehouse Company did not discover the negotiation and cashing of said checks by said Crowe within a reasonable time after the negotiation and cashing of the same, and for this reason Interior Warehouse Company thereby misled defendant and the prior endorsers on said checks.

XV.

Defendant was not guilty of any negligence or wrongdoing in the cashing of said checks, or any of them, or in charging the same, or any of them, to the account of said Interior Warehouse Company in defendant bank, and defendant was not involved in any manner in the misconduct of said Crowe in his negotiation and cashing of said checks, or any of them.

From the foregoing Findings of Fact the court draws and makes the following

CONCLUSIONS OF LAW

I.

The court has jurisdiction of this cause. At the time of institution of said cause there existed, and still exists, a diversity of citizenship between the plaintiffs and the defendant. The matter or controversy involved herein exceeds the sum or value of \$3,000.00.

II.

Defendant's said motion should be, in all respects, overruled. [63]

III.

The better view of the law is that the failure of Interior Warehouse Company to discover the negotiation and cashing of said checks by said Crowe within a reasonable time thereafter justifies a denial of recovery against defendant herein either on principles of negligence of Interior Warehouse Company or estoppel against it.

IV.

The principle of election of remedies by Interior Warehouse Company's claim against Underwriters at Lloyd's of London and plaintiff American Surety Company of New York on the theory that its employee, Crowe, had embezzled its money, whereas defendant could be liable only on the theory that it had paid the checks with its own funds, is but a partially satisfactory solution of this case, the decision of which is based primarily upon Conclusions V and VI hereof.

V.

In this case there were independent contractual liabilities, each running in favor of Interior Warehouse Company and none of which ran in favor of or against any of the parties to this cause, *inter se*. The insurers, Underwriters at Lloyd's of London and plaintiff American Surety Company of New York, each by separate contract guaranteed the honesty of Crowe to Interior Warehouse Company. The defendant could be liable to Interior Warehouse Company, if at all, only on principles of a contract between Interior Warehouse Company and defendant.

These were independent contractual obligations and the satisfaction of their primary liability by said insurers under their respective policies of insurance did not give rise to a legal or equitable or any right in them or their assignee or assignees to recover against defendant in this cause. [64]

VI.

The insurers, Underwriters at Lloyd's of London and American Surety Company of New York, in making payments to Interior Warehouse Company fulfilled the obligation of their several contracts to protect Interior Warehouse Company against all losses caused by Crowe's dishonesty. Thereby the insurers were subrogated to all remedies and rights which Interior Warehouse Company had against Crowe. Upon payment to it of these sums the Interior Warehouse Company suffered

no loss. The debt was paid. The fact that Interior Warehouse Company may have had another remedy against defendant on a different contract if Crowe had not been insured does not render defendant liable to the insurers, who as to it stand in the same position as Crowe.

The insurers paid by virtue of their respective contracts to protect the Interior Warehouse Company against all losses caused by Crowe's dishonesty. The Interior Warehouse Company suffered no loss, and there was no claim against defendant which could be assigned or which could inure to the insurers, or either of them, by subrogation.

VII.

Neither on principles of assignment of Interior Warehouse Company's said claim which arose because of the said defalcations of Crowe, nor on principles of subrogation, are plaintiffs or either of them entitled to recover from defendant in this case.

VIII.

Judgment should be entered herein in favor of defendant and against plaintiffs, and each of them, dismissing this cause and awarding to defendant its costs and disbursements herein incurred.

Dated: January 20, 1942.

JAMES ALGER FEE,
Judge.

[Endorsed]: Filed January 20, 1942. [65]

And afterwards, to wit, on the 20th day of January, 1942, there was duly Filed in said Court, Judgment, in words and figures as follows, to wit: [66]

In the District Court of the United States
for the District of Oregon

Civil 265

AMERICAN SURETY COMPANY OF NEW
YORK, a corporation, and E. L. McDOUGAL,
Plaintiffs,

vs.

THE BANK OF CALIFORNIA, NATIONAL
ASSOCIATION, a corporation,
Defendant.

JUDGMENT

The above-entitled and numbered cause having come on for trial before the court sitting without the intervention of a jury on March 25, 1941, which trial continued through March 26, 1941, and March 27, 1941, plaintiff E. L. McDougal appearing in person and by his attorneys Randall S. Jones, Nicholas Jaureguy, Plowden Stott and Maurice D. Sussman, plaintiff American Surety Company of New York appearing by the same attorneys, and defendant appearing by Borden Wood and Robert S. Miller, of its attorneys, and each party hereto having introduced his and its evidence and rested, and the court having considered the briefs of respective counsel and having made and entered herein findings of

fact and conclusions of law in favor of the defendant, and deeming itself advised in the premises, it is hereby

Considered, ordered, adjudged and decreed that the above-named plaintiffs, and neither of them, take anything by reason of their complaint herein but that the same be, and it hereby is, dismissed, and that the defendant have and recover of the plaintiffs, and each of them, defendant's costs and [67] disbursements herein incurred and taxed at \$79.65.

Dated: January 20, 1942.

JAMES ALGER FEE,
Judge.

[Endorsed]: Filed January 20, 1942. [68]

And afterwards, to wit, on the 12th day of March, 1942, there was duly Filed in said Court, an Opinion, in words and figures as follows, to wit: [69]

[Title of District Court and Cause.]

OPINION—DECEMBER 23, 1941

James Alger Fee, District Judge:

This action was brought by American Surety Company of New York, a New York corporation, and E. L. McDougal, a citizen and resident of the State of Oregon, to recover amounts paid by the defendant upon checks carrying forged endorsements. Defendant "The Bank of California, Na-

tional Association", is a corporation organized and existing under and by virtue of the National Banking Laws of the United States. "The place where its banking house or office shall be located and its operations of discount and deposit carried on and its general business conducted shall be the City and County of San Francisco with branches at Portland, Multnomah County, Oregon * * *.¹

The Interior Warehouse Company,² an Oregon corporation, doing business in Portland, was a depositor between October 2, 1935, and May 1, 1939, in the Portland branch of defendant [70] bank, and during all of this period maintained a deposit in excess of the amounts hereinafter shown to have been improperly paid out. Crowe, a bookkeeper of the Interior, prepared but did not sign checks to cover pay-rolls and other incidental expenses. He conceived the scheme of writing additional checks upon defendant bank, either to persons on the pay-rolls in sums beyond what was actually due them, or to non-existing persons, and of obtaining the money thereon by forging the names of the supposed payee. He carried this out successfully over a period of years, forging the endorsements, and generally cashing these checks with Meier & Frank Company, a mercantile establishment in Portland,

¹Excerpt from Article Second of Articles of Association of defendant hereinafter called the "Bank".

²Hereinafter called "Interior".

or with some individual. Crowe was not authorized to sign checks for the Interior, since this authority was vested only in two other employees. Neither of these men knew or suspected the scheme of Crowe, or the forging of the endorsements on the checks which they signed. Crowe compared the bank statements and returned checks with the records upon their receipt by Interior, and was thus able to delay detection. On trial, Crowe testified as to nineteen checks, the originals of which had been destroyed, that he had drawn the latter to fictitious payees and forged the endorsements thereon. The bank objected to the proof of these lost documents.

The American Surety Company of New York and the underwriters at Lloyds in London,³ (assignors of E. L. McDougal), had written policies of insurance by which the employees of Interior, including Crowe, were bonded, and Interior insured [71] against the loss it might sustain by reason of dishonesty of any of these employees. Interior procured and paid for these policies. No insurance was taken by Interior upon its checks, nor indemnity thereon for loss by reason of forgery.

On October 16, 1939, Interior and insurers notified defendant that payments on these checks were unauthorized. Thereafter the insurers paid Interior the full amount of the loss caused by the dis-

³Hereinafter generally designated as the "insurers".

honesty of its employee, and accepted assignment of any rights which Interior might have against the Bank. This action was then brought for \$6,562.33, the amount of the loss thus paid. The Bank contended that diversity of citizenship between it and each of the plaintiffs did not exist. The court overruled the motion based on this contention. The cause came on regularly for trial before the court, sitting without a jury, based upon a pre-trial order which fully set out the issues and listed the documentary evidence.

At the outset the jurisdictional point must be met. The bank contends that it is a citizen of Oregon by virtue of its operation of a branch in this state. The defendant is a corporation formed under the federal banking laws of general application. Formerly, it was a state bank of California and was thus enabled as a "mother bank" to carry its branches into the federal system.⁴

The history of legislation relating to national banks indicates that the statutes contemplate that such an institution shall have situs in one state,⁵ and that jurisdiction [72] of a federal court attaches under the ordinary rules as to diversity of citizenship based on that assumption.⁶ Federal jurisdic-

⁴The Act of Mar. 3, 1865, c. 78, §7, 13 Stat. 484. This Act was amended in 1927 to permit national banks subsequently created to maintain branches. 12 USCA, § 36.

⁵12 USCA, § 22, § 81.

⁶28 USCA § 41, subd. (1) and (16).

tion is not any longer based upon the fact of federal incorporation of a bank.⁷ Nor has the opposite view been adopted by Congress, namely, that such incorporation carries with it citizenship in each state of the Union. The intent of the statutes is to steer a middle course and to confer upon a national bank the right to come into or remove a cause to a United States court in common with private corporations invested with powers by the several states.⁸ The state of incorporation is the criterion of residence and citizenship of corporations authorized by the laws of the various states.⁹ Congress intended that analogous tests should be applied in cases of entities endowed with existence by federal power. The principal place of business is the distinguishing factor. Dual incorporation has not been the rule with corporations organized in the various states,¹⁰ probably because the right to go into a federal court outside the state of incorporation might be thereby lost.

The whole doctrine of diversity of citizenship of corporations is founded upon a judicial fiction¹¹ of

⁷28 USCA § 41, subd. (16) n. 6.

⁸Continental National Bank of Memphis vs. Buford, 8 Cir. 191 U. S. 119.

⁹St. Louis Nat. Bank vs. Allen, Cir. Ct. D. of Iowa, 5 F. 551; Fulton National Bank of Atlanta vs. Hozier, 5 Cir. 267 U. S. 276; New England Nat. Bank of Kansas City vs. Calhoun, 8 Cir. 9 F. (2d), 272.

¹⁰See St. Louis and San Francisco Railway Company vs. James, 8 Cir. 161 U. S. 545; Southern Railway Company vs. Allison, 190 U. S. 326.

extremely technical character. Reasoning from such artificial premises is illusory. In view of the historical sanction, it is [73] believed Congress used the doctrine as a foundation for the enactments relating to national banks. Although, then, the modern tendency has been to limit jurisdiction based on diversity of citizenship actual or implied, no hardship or inconvenience is discovered in the application of a rule analogous to that of state corporations.¹² Therefore, until the entire foundation crumbles, a national bank should be considered as a citizen of the state where it has its principal place of business, irrespective of the fact that it has authorized branches in other states. A state corporation carries on business in many states and may have branches widely scattered, yet it is a citizen of the state where it is incorporated. The court has jurisdiction, because the Bank must be viewed as a citizen of California. Questions of venue were waived.

An examination of the merits is now required. There is no binding authority in the state of Oregon upon the exact situation here presented. Many authorities have been cited from other jurisdictions. But calculations of numerical weight of authority from other jurisdictions will not suffice. This court

¹¹Bank of the United States vs. Deveaux, 9 U. S. 61.

¹²Under the legislation as to banking transactions, the branch can be viewed as a "separate business entity". 12 USCA §§ 601-604. Pan-American Bank & Trust Co. vs. National City Bank of New York, 2 Cir. 6 F. (2d), 762; In re Harris, 27 F. Supp. 480.

must attempt to give weight to the considerations which, judged from previous utterances, will affect the Supreme Court of Oregon, when that tribunal deals with a state of facts such as is here presented.

The rule is uncontroverted in most jurisdictions that a bank, which receives a deposit, makes a contract that it will [74] pay out the money only upon the order of the depositor.¹³ If, therefore, a bank pays money upon the depositor's check bearing a forged endorsement of the name of the payee, the bank is liable therefor.¹⁴ This position is ordinarily justified in legal theory by the presumption that the bank under such circumstances pays out its own money and not the money of the depositor.¹⁵ The depositor, on the other hand, is not required to know the signature of the payee of his check.¹⁶ He

¹³ Grants Pass & Josephine Bank vs. City of Grants Pass, 145 Oregon, 624.

¹⁴ Leather Manufacturers' Bank vs. Merchants' Bank, 128 U. S. 26, 34; Midland Savings & Loan Co. vs. Tradesmen's Nat. Bank of Oklahoma City, Okl. 10 Cir. 57 F. (2d), 686.

¹⁵ Board of Education of Jefferson Tp. vs. National Union Bank of Dover, 16 New Jersey Miscellaneous 50.

¹⁶ National Surety Company vs. President and Directors of Manhattan Company, 252 New York 247; Detroit Piston Ring Co. vs. Wayne County & Home Savings Bank, 252 Michigan 163; Los Angeles Investment Company vs. Home Savings Bank of Los Angeles, 180 California 601; William D. Shipman vs. Bank of State of New York, 126 New York 318; Jordan Marsh Company vs. National Shawmut Bank, 201 Massachusetts 397; United States Cold Storage Company vs. Central Manufacturing District Bank, 343 Illinois 503. See England Nat. Bank vs. United States, 8 Cir. 282 F. 121.

may, therefore, receive back the statements of his account, accompanied by cancelled checks with forged endorsements of the respective payees and hold these without examination, and the bank will still be liable to pay him all moneys which it has not disbursed in accordance with his order.

This general rule has been questioned, however, where a trusted employee of a large concern supplies the data upon which the checks are drawn to one of the officers charged with signing the checks and, thereafter, forges the checks which he has theretofore improperly submitted to such an officer. Under such circumstances, some courts will hold [75] that the depositor had no duty at any time with regard to either its employee or the forged endorsements on the checks.¹⁷ Other courts hold there was a duty owed to the public to supervise the employee and there was a further duty to see that checks for amounts which the concern did not owe should not be consistently placed in the hands of the public nor offered to the drawee bank.¹⁸ The better view would seem to be that if such conduct were long pursued, a denial of recovery from the drawee bank could be justified, either on principles of negligence or estoppel.

In this case the court finds that the Interior did

¹⁷ National Surety Company vs. President and Directors of Manhattan Company, *supra*; Detroit Piston Ring Co. vs. Wayne County & Home Savings Bank, *supra*.

¹⁸ Young vs. Gretna Trust & Savings Bank, 184 Louisiana, 872; Defiance Lumer Company vs. Bank of California, N. A., 180 Washington, 533.

not discover within a reasonable time that checks for amounts which it did not owe on payrolls were consistently signed by its responsible officers and, thereafter, forged by its dishonest employee, Crowe, and that thereby defendant and the prior endorsers were misled. The Bank was not guilty of negligence and was not involved in the misconduct of Crowe. It is liable, if at all, solely on the contract implied from the deposit by Interior. Since there is no decision of the state courts upon this point cited, however, no attempt will be made to determine the instant case on this ground.

Irrespective of whether the Bank was liable to Interior, its liability to the insurers presents an entirely different problem. Courts of many jurisdictions, which are entitled to the highest respect, have held that a bank is liable to a [76] surety¹⁹ under circumstances similar in certain phases to those in the case at bar.²⁰ The controlling factors in these decisions are, usually, the rule that the Bank is absolutely liable wherever it pays out money on a forged endorsement of the payee,²¹ and, secondly,

¹⁹It might be doubtful whether the insurers stand in the same position as sureties, but the cause has been argued upon that assumption. This is apparently true, also, in the case of *American Central Insurance Co. vs. Weller*, 106 Oregon 494.

²⁰*National Surety Company vs. President and Directors of Manhattan Company*, *supra*; *Fidelity & Deposit Co. of Maryland vs. Forth Worth Nat. Bank, Bd. of Com. Appeals (Texas)* 1933; *Grubnau vs. Centennial National Bank*, 279 Pennsylvania 501.

²¹*Grubnau vs. Centennial National Bank*, *supra*.

the alleged principle that a surety is entitled to all the remedies which "the creditor would have against all persons liable for the debt".²²

These decisions neglect consideration of the fact that the forger is the only wrongdoer in the situation. Likewise, they neglect consideration of the highly equitable nature of subrogation.

However, it is strongly urged that the Oregon Supreme Court accepted the reasoning of these cases in *United States Fidelity Co. vs. United States Nat. Bank*, 80 Oregon, 361. In that case, an individual had his own deposit in a bank and also an account as guardian for an incompetent. He withdrew all the money from his individual account, but the bank thereafter still honored his individual checks, charging them against the guardianship fund. It was held that the surety on the bond of the guardian, which paid the amount of the defalcation accomplished by the [77] payment of the individual checks, was entitled to recover from the bank. The court say:

"The bank, by its wrongful act in paying out the funds on the private checks of another, made it possible for that other to squander the money of the wards, and thus became in effect a joint tort-feasor liable for the resulting defalcation."

Here, if the Bank had knowingly abetted Crowe

²²*National Surety Co. vs. National City Bank of Brooklyn*, 172 New York Supplement, 413, 415.

in his unlawful acts, the situations would be comparable. This decision need not be referred to any principle of suretyship. A bank which claims it has paid money which belonged to Jones upon a check written by Smith is liable to Jones or the assignee of Jones for the full amount of his deposit, in any event.

Indeed, the Oregon court has on the contrary canalized this doctrine as to sureties by strict limitations. In *American Central Insurance Co. vs. Weller*, 106 Oregon 494, 502, the court say, with regard to the right of subrogation:

“It rests upon the maxim that no one should be enriched by another’s loss and may be invoked wherever justice demands its application, in opposition to the technical rules of law.”

Also quoting 25 Ruling Case Law, page 1313, Section 2, it is said:

“‘One who has indemnified another in pursuance of his obligation so to do succeeds to, and is entitled to, a cession of all the means of redress held by the party indemnified against the party *who has occasioned the loss.*’²³

“4. It is unquestionably the general rule that on payment of a loss, the insurer acquires the right to be subrogated *pro tanto* to any right of action which the insured may have against any third person *whose wrongful act or neglect caused the loss* * * *²³ [78]

²³ Emphasis supplied.

The doctrine thus announced carries the important limitations phrased in the italicized portions above,²⁴ which fact is apparently overlooked in many of the cases from other jurisdictions above cited.

The limited application of the principle thus supported by the Oregon Court has been applied in other jurisdictions with variations. The surety has been denied recovery against a third party, (1) because there is an election of remedies where the surety is required to pay the loss, (2) because the primary cause of the loss was misconduct for which the surety bound itself, and no other party innocent thereof should be held responsible, (3) because subrogation can only be applied against the party causing the loss, and not against innocent parties independently liable for the amount of the loss.

An excellent illustration of the first variation of the application of this principle²⁵ is found in *United States Fidelity & Guaranty Co. vs. Fidelity National Bank & Trust Co.*, 232 Missouri Appeal 412. There, one Cheney, an employee of Continental, had forged endorsements on certain checks which were cashed by the bank in which Continental had a de-

²⁴ See also *American Bonding Co. vs. State Savings Bank*, 47 Montana 332; *American Surety Co. of New York vs. Lewis State Bank*, 5 Cir. 58 F. (2d), 559, 560-1; *Meyers vs. Bank of America National Trust & Savings Association*, 11 California (2d) 92.

²⁵ See also *National Surety Co. vs. Perth Amboy Trust Co.* 3 Cir. 76 F. (2d), 87, 90; *Midland Savings & Loan Co. vs. Tradesmen's Nat. Bank of Oklahoma City, Okl.*, *supra*, 693.

posit. The surety company had written a bond against loss [79] for misfeasance by Cheney. With full knowledge of the facts, Continental demanded and received payment of its loss by the surety. The court held thereby Continental had affirmed the act of the bank in paying the money out of the account of Continental, and that the surety took no rights by subrogation or assignment.

This theory of election of remedies is not entirely satisfactory, since it leaves out of consideration the onus of guilt which the surety bound itself by contract to assume. Plaintiffs here assert that surety companies, if such a test were adopted, would require the party insured to bring action against the bank first. The practical answer is that they will not remain in the business long if they attempt such measures.

The courts which adopt the second application of the principle above set out indicate that when the sureties pay the loss created under such circumstances they do nothing more than to satisfy the obligation which they assumed for hire. Public policy requires that when a loss predicated upon dishonesty is paid by surety who has assumed that obligation, no subrogation should follow except against the wrongdoer.²⁶ This doctrine is exempli-

²⁶ See *American Bonding Co. vs. Welts*, 9 Cir. 193 F. 978, 980-1; *United States Fidelity & Guaranty Co. vs. Title Guaranty & Surety Co.*, (D. C.), 200 F. 443, 448-9; *Washington Mechanics' Savings Bank vs. District Title Ins. Co.*, Cir. D. C. 65 F. (2d), 827, 830; *American Bonding Co. vs. First National Bank of Covington*, 27 Kentucky Law 393.

fied by the leading case of *National Surety Co. vs. Arosin*, 8 Cir. 198 F. 605. In the last cited case, Bourne was county auditor, for whose official conduct plaintiff surety company had made itself responsible. Bourne made up false redemption warrants. Some of these [80] were cashed upon forged endorsements upon National German-American Bank, where the county had a deposit. The court held the bank was not liable since the misconduct of Bourne, for which the surety had made itself liable, was the primary cause of the loss.

There are several cases which in net result hold that where the bond is written conditioned upon the honesty of a person who defaults and the loss is paid by his surety, there can be no subrogation.²⁷ Criticism has been directed to this doctrine where applied to other than official bonds. However, the consequences are the same. The court believes the principle generally applicable. The wrongdoer should bear the loss. Any surety who has made itself responsible for him should suffer the loss, without recourse.

The third ground is buttressed by cases such as *New York Title & Mortgage Co. vs. First National Bank of Kansas City*, 8 Cir. 51 F. (2d), 485, 487.²⁸

²⁷ *American Surety Co. vs. Citizens' Nat. Bank*, 8 Cir. 294 F. 609; *American Bonding Company vs. Welts*, supra; *Stewart vs. Commonwealth*, 104 Kentucky 489; *American Bonding Co. vs. State Savings Bank*, supra.

²⁸ See also *American Bonding Co. vs. First National Bank of Covington*, supra; *Louisville Trust Company vs. Royal Indemnity Company*, 230 Kentucky, 482.

In that case, a loan broker procured issuance by title company of title insurance policies to a loan association guaranteeing the latter against loss by reason of defects in title of mortgagors to real estate covered by certain mortgages. The notes and the mortgages were in fact forged by the loan broker. The checks [81] drawn upon the bank by the loan association were then forwarded. Whereupon the loan broker obtained delivery thereof, forged the names of the supposed borrowers and cashed them. The title company paid the loss to the loan association and brought action against the bank because it had cashed checks on which the endorsements of the respective payees had been forged. The court held that no recovery could be allowed because there were two primary obligations running to the loan association from the title company and the bank, neither of which was a wrongdoer, and that subrogation would not be applied as a remedy. The court say:

“But if there were any doubt as to the soundness of this position, we think it clear that plaintiff is not entitled to invoke the remedy of subrogation, because that right is an equitable one, and is applicable in cases in which one party is required to pay a debt for which another is primarily answerable, and which, in equity and good conscience, ought to be discharged by the latter. It is the method which equity employs to require the payment of the debt by him who in good conscience ought to

pay it, and to relieve him whom none but the creditor could ask to pay.”

This identical recognition of the equitable nature of subrogation was also made by the Supreme Court of Oregon in the case of *American Central Insurance Company vs. Weller*, supra, 507, under the following circumstances:

Weller sold an automobile to Miller upon a down payment sufficient to cover among other things cost of insurance and a conditional sales contract. This contract was assigned to a bank and payment guaranteed by Weller, who also took out [82] insurance, named Miller as assured, which insured also against conversion, loss payable to the bank or Miller as their interests might appear. Miller himself thereafter converted the car. The insurer paid the loss to the bank, taking an assignment of the conditional sales contract and the guaranty of Weller and brought action against the latter. The court held that, since the insurer had no contract as to the debt but a primary liability as to the conversion of the car, upon payment thereof the debt which arose on the contract of guarantee was extinguished and that insurer had no rights either by subrogation or assignment.

The court say:

“37 Cyc. 370 reads: The right of subrogation, as a general rule

‘is broad enough to include every instance in which one party is required to pay a debt for which another is primarily an-

swerable, and which, in equity and good conscience, ought to be discharged by the latter, and is the mode which equity adopts to compel the ultimate discharge of the debt by him who, in good conscience, ought to pay it, and to relieve him whom none but the creditor could ask to pay.' (Italics ours.)

“6. Weller as guarantor comes within the class that should be relieved under the rule mentioned. No one but the creditor, Ashley & Rumelin, could ask him to pay. When the insurance company paid the \$300 on the policy the debt was satisfied to that amount as to Weller, *and could not be assigned.*”²⁹ [83]

If the Oregon courts were confronted with the facts here involved, it is believed the principles announced in the last quoted case would be followed.

The proper field for decision is then furnished by a consideration of the rights acquired by the insurers upon payment of the loss. Interior had authorized certain employees to sign checks. Each of the checks in question was properly signed. But the obligation of the insurers upon their separate contracts was to pay the loss caused by fraudulent conduct, embezzlement, theft or dishonesty of certain employees. The insurers had no responsibility for checks of Interior, even though forged.

²⁹ Emphasis supplied. See *Meyers vs. Bank of America National Trust & Savings Association*, supra.

The independent liability of the Bank to Interior arose from an entirely different contract, which resulted from the deposit made by Interior. The Bank broke its engagement when it cashed checks which did not bear the endorsements of the respective payees. As respects liability on this contract, it mattered not whether Crowe was an employee of Interior. The Bank had no special engagement as to him. It would have been liable if the endorsement had been forged by an entire stranger.

Thus, the liabilities of the insurers and the Bank, respectively, to Interior were entirely diverse. Each was contractual, but each was founded on a different contract. The Bank received consideration for its engagement in the deposit made by Interior. The insurers were paid premiums by Interior for their undertakings. The finding above made, regarding the issuance of apparently valid checks by Interior, should not be disregarded in the consideration of the relative [84] positions of the insurers and the Bank. In order to operate with confidence and with less supervision, Interior had insured itself against the dishonesty of its employees, including Crowe. In reliance on these policies, Interior took less precaution, probably, and the way was open for Crowe to use checks which appeared valid upon their faces to perpetrate fraud upon Interior, the endorsers, the collecting Banks, and the defendant Bank. The insurers made themselves primarily responsible for the defalcation of Crowe. The dishonesty of Crowe was the sole cause of the loss sustained by anyone.

If it had not been for that factor, no loss would have occurred. One should not be entitled to recover from another that which he has paid out in discharging a debt in the performance of his own obligation.”

Interior is not entitled to more than one recovery. If the Bank paid now there would be a dual recovery. The surety has paid the loss upon its undertaking, and thus liquidated the debt. This is made clearer by disregarding precedent and looking at realities. In the event the defaulting employee himself had paid the amount of the loss to the Interior, no court would permit Interior thereafter to recover against the Bank. It is held that when the Bank cashed the forged checks it had used its own money. The forger then received the money of the Bank. If he paid the Interior he would have used the money of the Bank, and thereafter Interior [85] would have had no claim against the Bank. Because of his dishonesty and default, the insurers paid money to Interior. This money was paid by the insurers to replace the money belonging to the Bank. Once it came into the hands of Interior, the latter was entitled to call on the Bank solely for the balance of its deposit, less the amount which had been finally paid to it by insurers.

The sole cause of the loss was the conscious dis-

³⁰ See *Amick vs. Columbia Casualty Co.*, 8 Cir. 101 F. (2d), 984, 986; *Commercial Casualty Ins. Co. vs. Petroleum Pipe Line Co.*, 10 Cir. 83 F. (2d), 412, 414.

honesty of Crowe, the only person who benefited by the forgeries of these checks. According to the record, he has made no restitution to anyone. If the Bank is required to pay this money, the chance of recovery from Crowe is slight. If the sureties recover from the Bank, their interest in the matter will be slight. Probably, for a consideration in view of such results the sureties would again insure Crowe. There is no evidence that he has been prosecuted civilly or criminally. He is the wrongdoer. All other parties are innocent. He should bear the loss. But here the insurers agreed to bear the burden for him, if he was guilty of dishonesty. This is exactly the obligation which they assumed for hire.

This situation is brought into highlight by the fact that after they paid the loss, the insurers procured the forger to come into court to testify what he did in order to take advantage of Interior. He co-operated by testifying as to his own wrongful acts.

If recovery is permitted against the Bank, the situation will be prolific of litigation. The defendant can sue the collecting banks, and these can sue Meier & Frank Company and other primary endorsers. Plaintiff suggests [86] that the loss will eventually fall upon the insurance companies protecting some of these concerns. To the court it seems more reasonable to allow the loss to remain on the plaintiff insurers. They guaranteed the honesty of Crowe. They have paid the loss. The burden is resting where it belongs.

Interior had an independent right on contract against the Bank. But its primary right was against Crowe and his insurers. The insurers paid the money for Crowe, and under the principle laid down by the Oregon Supreme Court they have a remedy against Crowe who was primarily responsible.

Only Interior could ask the Bank to pay. The latter was innocent of wrongdoing, but had broken its contract. It would be unconscionable and unjust to hold the Bank responsible for the unlawful acts of Crowe. When the insurers paid the loss on the policies, the debt was satisfied. There was nothing which insurers were entitled to recover either on principles of subrogation or by assignment.³¹ Neither right nor remedy longer subsisted.

Findings and judgment may be prepared.

[Endorsed]: Filed March 12, 1942. [87]

And afterwards, to wit, on the 18th day of April, 1942 there was duly Filed in said Court, Notice of Appeal, in words and figures as follows, to wit: [88]

³¹ *Meyers vs. Bank of America National Trust & Savings Association, supra*; *Louisville Trust Company vs. Royal Indemnity Company, supra*; *American Surety Company of New York vs. Lewis State Bank, supra*.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Bank of California National Association, a Corporation, the above named defendant; and
To Messrs. McCamant, King & Wood, Borden Wood, and Robert S. Miller, attorneys for defendant:

Notice Is Hereby Given that American Surety Company, a corporation, and E. L. McDougal, the above named plaintiffs, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from each and every part and from the whole of that certain final judgment dated and entered in the above entitled cause January 20, 1942.

Dated this 18th day of April, 1942.

MAURICE D. SUSSMAN

E. L. McDOUGAL

PLOWDEN STOTT

NICHOLAS JAUREGUY

Attorneys for Plaintiffs. [89]

State of Oregon

County of Multnomah.—ss.

Due and legal service of the foregoing Notice of Appeal is hereby acknowledged at Portland, Multnomah County, Oregon, this 18th day of April, 1942, by receipt of a duly certified copy thereof as required by law.

McCAMANT, KING & WOOD

Of Attorneys for Defendant.

[Endorsed]: Filed April 18, 1942. [90]

And Afterwards, to wit, on the 18th day of April, 1942 there was duly Filed in said Court, a Bond for Costs on Appeal, in words and figures as follows, to wit: [91]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents that American Surety Company of New York, a corporation, and E. L. McDougal, the plaintiffs above named, as principals, and United Pacific Insurance Company, a Washington corporation, as surety, are held and firmly bound unto The Bank of California National Association, a corporation, the above named defendant, in the penal sum of Two Hundred Fifty Dollars (\$250.00), for the payment of which we firmly bind ourselves, our successors, assigns, executors, and administrators.

The condition of this obligation is such that

Whereas, the said American Surety Company of New York, a corporation, and E. L. McDougal, have appealed to the United States Circuit Court of Appeals for the Ninth Circuit from that certain final judgment entered in the above entitled court and cause on the 20th day of January, 1942.

Now, Therefore, if the said appellants shall pay all costs if said appeal is discussed or the judgment affirmed, and shall pay such costs as the appeal court shall award against them, or either of them, if such

judgment be modified, then this obligation shall be void, otherwise in full force [92] and effect.

Executed this 18th day of April, 1942.

AMERICAN SURETY COMPANY
OF NEW YORK, a Corporation,

By W. A. KING

E. L. McDOUGAL

Principals.

[Seal]

UNITED PACIFIC INSURANCE
COMPANY,

a Washington corporation,

By H. T. CURTIS

Attorney-in-fact.

Surety.

State of Oregon,

County of Multnomah—ss.

Due and legal service of the foregoing Bond for Costs on Appeal is hereby acknowledged at Portland, Multnomah County, Oregon, this 18th day of April, 1942, by receipt of a duly certified copy thereof as required by law.

McCAMANT, KING & WOOD

Attorneys for Defendant.

[Endorsed]: Filed April 18, 1942. [93]

And Afterwards, to wit, on the 21st day of May, 1942, there was duly Filed in said Court, a Motion for Order Extending Time to file record and Docket cause in Appellate Court, in words and figures as follows, to wit: [94]

[Title of District Court and Cause.]

MOTION FOR ORDER EXTENDING TIME TO
FILE RECORD AND DOCKET CAUSE IN
APPELLATE COURT.

Come now the plaintiffs-appellants in the above entitled cause, by and through Maurice D. Sussman, of their attorneys, and move the Court for an order extending the time to file the record on appeal and docket the cause in the Appellate Court to and including the 25th day of June, 1942, and in support of this Motion respectfully represents as follows:

That the Notice of Appeal was filed on the 18th day of April, 1942, and that forty (40) days from said date have not yet elapsed, that because of the large number of exhibits introduced at the trial and which are a part of the record of this case, the parties, in order to save expense and to shorten the record and make same more feasible and convenient to be included in the transcript of record and for review by the Appellate Court, desire to shorten the record by stipulation and to properly do so, it is necessary that the parties have before them the transcript of testimony presented at the trial, which transcript has not yet been completed by the court reporter, and by reason of this fact, and the time necessary to prepare proper stipulation, additional time is necessary to properly prepare the record for the Appellate Court.

MAURICE D. SUSSMAN

Of Attorneys for Plaintiffs-Appellants.

[Endorsed]: Filed May 21, 1942. [95]

And Afterwards, to wit, on the 21st day of May, 1942 there was duly Filed in said Court, a Stipulation for extension of time to file record on appeal, in words and figures as follows, to wit: [96]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the attorneys for the above named plaintiffs-appellants and the attorneys for the defendant-appellee, that the plaintiffs-appellants may have to and including the 25th day of June, 1942, in which to file the record and docket the above entitled cause in the Circuit Court of Appeals for the Ninth Circuit.

Dated this 19th day of May, 1942.

PLOWDEN STOTT,
NICHOLAS JAUREGUY,
MAURICE D. SUSSMAN, and
E. L. McDOUGAL,

Attorneys for Plaintiffs-
Appellants.

McCAMANT, KING & WOOD,
Attorneys for Defendant-
Appellee.

[Endorsed]: Filed May 21, 1942. [97]

And Afterwards, to wit, on Thursday, the 21st

day of May, 1942, the same being the 70th Judicial day of the Regular March 1942 Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [98]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
RECORD ON APPEAL

Based upon the Motion of the plaintiffs-appellants, and the stipulation between the attorneys for the parties to the above entitled action, and the Court being fully advised,

It Is Hereby Ordered That the plaintiffs-appellants may have to and including the 25th day of June, 1942, in which to file the record and docket the above entitled cause in the Circuit Court of Appeals for the Ninth Circuit.

Dated this 21st day of May, 1942.

[s] JAMES ALGER FEE
Judge.

[Endorsed]: Filed May 21, 1942. [99]

And Afterwards, to wit, on the 19th day of June, 1942 there was duly Filed in said Court, an Amended Designation of Contents of Record on Appeal, in words and figures as follows, to wit: [100]

[Title of District Court and Cause.]

AMENDED DESIGNATION OF CONTENTS
OF RECORD ON APPEAL.

The American Surety Company of New York, a corporation, and E. L. McDougal, plaintiffs above named, and the appellants in the appeal of the above entitled case to the United States Circuit Court of Appeals for the Ninth Circuit, hereby designate the complete record, proceedings and evidence in said case for inclusion in the record on appeal and the same includes the following:

Complaint.

Motion of defendant to dismiss.

Affidavit in connection with defendant's motion to dismiss.

Order reserving motion to dismiss to time of trial.

Answer.

Pre-trial order.

Transcript of Testimony.

All exhibits admitted at the trial.

Order overruling defendant's motion to dismiss.

Findings of fact and Conclusions of law.

Judgment.

Written opinion on merits.

Defendant's notice of appeal.

Defendant's bond for costs on appeal.

Designation of contents of record on appeal.

Order extending time in which to file the record and docket the above entitled cause in the Circuit Court of Appeals.

Stipulation of parties with reference to the omission of the printing of some of the exhibits.

Order that all original exhibits be sent to the Circuit Court of Appeals.

Dated this 19th day of June, 1942.

MAURICE D. SUSSMAN

E. L. McDOUGAL

PLOWDEN STOTT

NICHOLAS JAUREGUY

Attorneys for Plaintiffs.

State of Oregon,
County of Multnomah—ss.

Due service of the within Amended Designation of Contents, etc. is hereby accepted in Multnomah County, Oregon, this 18th day of June, 1942, by receiving a copy thereof duly certified to as such by Maurice D. Sussman, one of the attorneys for plaintiffs.

BORDEN WOOD,

Of Attorneys for Defendant.

[Endorsed]: Filed June 19, 1942. [101]

And Afterwards, to wit, on the 19th day of June, 1942 there was duly Filed in said Court, Stipulation re omission of the printing of some of the Exhibits, in words and figures as follows, to wit: [102]

[Title of District Court and Cause.]

STIPULATION re EXHIBITS

For the purpose of reducing the record in the Circuit Court of Appeals and in order to eliminate issues upon which there is now no controversy, the parties hereto hereby enter into this stipulation, but this stipulation shall not be construed as preventing either party hereto from including in the record on appeal any portions of the record which the parties would be entitled to include therein in the absence of this stipulation.

PRESENTATION OF CLAIMS AND PAYMENTS TO INSURED.

It is further stipulated and agreed that upon discovery of the loss claimed to have been sustained by Interior Warehouse Company, a corporation, that corporation duly made claim upon American Surety Company of New York and upon Lloyds of London for payment upon the respective policies which are in evidence in this case, that payment was duly made by said Lloyds of London to said Interior Warehouse Company in the sum of \$5,562.33, that payment was duly made by said American Surety Company of New York to said Interior Warehouse Company in the sum of \$1000.00, said payments being received by said Interior Warehouse Company in payment of said loss and in satisfaction of the obligations under [103] said respective policies. That plaintiffs' exhibits 10, 11,

12, 13, 13A, 15, 16, 17 and 18 were relied upon to prove the facts stipulated to in this paragraph.

PLAINTIFFS' EXHIBITS

It is Stipulated and Agreed that plaintiffs' exhibit 1 consists of 107 original checks listed in Paragraph VIII of plaintiffs' complaint and in Schedules 1, 2, 3, and 4 of plaintiffs' Exhibit 3 ("Statement of Funds Withdrawn, with accompanying schedules, prepared by Price, Waterhouse & Company"); that it shall not be necessary to include all said checks in the designation of the record for printing, but that the parties may include such of said checks for printing as they may desire.

Plaintiffs' Exhibit 2 consists of 19 carbon copies of the "face only" of the alleged checks listed in Paragraph VIII of plaintiffs' complaint and in schedule 5 of said exhibit 3, and since these are carbon copies of the "face only", no endorsements of said checks appear; that it shall not be necessary to include all said carbon copies for printing, but the parties hereto may designate for printing such of said carbon copies of checks as they may desire.

DEFENDANT'S EXHIBITS

It is Further Stipulated and Agreed that defendant's exhibits 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33 and 34 are respectively the identical documents and records as specified in paragraph 2 of the Pre-trial Order, and as explained by the various

witnesses, and that in each instance in which any witness described any of said exhibits or related the contents thereof, such testimony correctly stated the facts. As a further description of defendant's exhibit 24, it is agreed that it consists of cancelled checks and bank statements delivered by the [104] defendant, The Bank of California, to said Interior Warehouse Company, each month covering the period from January 1935 to June 1939, and that the average number of checks per month was approximately 275. On each of the statements, on the lower right-hand portion thereof, is found in printing the following legend: "Please examine at once. If no error is reported in ten days, this account will be considered correct."

SENDING OF ORIGINAL EXHIBITS AND OMISSION OF PORTIONS FROM PRINT- ED RECORD.

It is Further Stipulated and Agreed that all the exhibits introduced in the trial be sent to the Circuit Court of Appeals in the original form and that appellants may obtain an order directing the Clerk of the District Court to send said exhibits, and further that the appellants may apply to the Circuit Court of Appeals for the Ninth Circuit for an order permitting them to omit certain exhibits from the printed record, and that only material portions of certain other exhibits be printed, but that the order dispensing with the necessity of printing all the

exhibits should allow the parties to refer to any of said exhibits in their briefs and arguments by reference to the original exhibits.

Dated this 18th day of June, 1942.

PLOWDEN STOTT,
NICHOLAS JAUREGUY,
MAURICE D. SUSSMAN and
E. L. McDOUGAL,
Attorneys for Plaintiffs-
Appellants.
McCAMANT, KING & WOOD,
Attorneys for Defendant,
Appellee.

[Endorsed]: Filed June 19, 1942. [105]

And Afterwards, to wit, on the 22nd day of June, 1942 there was duly Filed in said Court, a Stipulation for time to file record on appeal, in words and figures as follows, to wit: [106]

[Title of District Court and Cause.]

STIPULATION.

It Is Hereby Stipulated and Agreed by and between the attorneys for the above named plaintiffs-appellants and the attorneys for the defendant-appellee, that the plaintiffs-appellants may have to and including the 10th day of July, 1942, in which to file the record and docket the above entitled cause in the Circuit Court of Appeals for the Ninth Circuit.

Dated this 20th day of June, 1942.

PLOWDEN STOTT,
NICHOLAS JAUREGUY,
MAURICE D. SUSSMAN,
E. L. McDOUGAL,

Attorneys for Plaintiffs-
Appellants.

McCAMANT, KING & WOOD,
Attorneys for Defendant-
Appellee.

[Endorsed]: Filed June 22, 1942. [107]

And Afterwards, to wit, on Monday, the 22nd day of June, 1942, the same being the 96th Judicial day of the Regular March 1942 Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [108]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
RECORD ON APPEAL

Based upon the Stipulation between the attorneys for the parties to the above entitled action, and the Court being fully advised,

It Is Hereby Ordered that the plaintiffs-appellants may have to and including the 10th day of July, 1942, in which to file the record and docket the

above entitled cause in the Circuit Court of Appeals for the Ninth Circuit.

Dated this 22nd day of June, 1942.

JAMES ALGER FEE

Judge.

[Endorsed]: Filed June 22, 1942.

And Afterwards, to wit, on Monday, the 22nd day of June, 1942, the same being the 96th Judicial day of the Regular March 1942 Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [110]

[Title of District Court and Cause.]

ORDER RE EXHIBITS

Based upon the stipulation between the parties to the above entitled action, by and through their attorneys, and the Court being fully advised,

It Is Hereby Ordered and the clerk of this Court is hereby directed to send all the original exhibits introduced in the trial of the above case to the Circuit Court of Appeals for the Ninth Circuit.

Dated this 22nd day of June, 1942.

JAMES ALGER FEE

Judge.

[Endorsed]: Filed June 22, 1942. [111]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL.

United States of America,
District of Oregon—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 111 inclusive, constitute the transcript of record on appeal from a judgment of said Court in a cause therein numbered Civil 265, in which American Surety Company of New York, a corporation, and E. L. McDougal are plaintiffs and appellants, and The Bank of California, National Association, a corporation, is defendant and appellee; that said transcript has been prepared by me in accordance with the designation of contents of the record on appeal filed therein by appellants and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that the foregoing transcript is a full, true and correct transcript of the record and proceedings had in said Court in said cause, as the same appear of record and on file at my office and in my custody, in accordance with the said designation.

I further certify that the cost of the foregoing transcript is \$5.00 for filing Notice of Appeal, and \$20.55 for comparing and certifying the within transcript, making a total of \$25.55 and that the same has been paid by the said appellants.

I further certify that I am transmitting with said transcript, the duplicate of the reporter's transcript filed in the Clerk's office.

I further certify that I am transmitting to the Circuit Court of Appeals for the Ninth Circuit, pursuant to an order of the District Court of the United States for the District of Oregon, all of the original exhibits introduced as evidence at the trial of the said cause.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Portland, in said District, this 25th day of June, 1942.

[Seal] G. H. MARSH,
 Clerk. [112]

[Title of District Court and Cause.]

TESTIMONY

Portland, Oregon, March 26, 1941.

10:20 o'clock A.M.

Be It Remembered that, on this 26th day of March, 1941, at the hour of 10:20 o'clock A.M. thereof, the above entitled cause came regularly on for hearing before the above entitled court, the Honorable James Alger Fee, Judge, presiding.

The plaintiffs appeared by Messrs. Randall S. Jones, Plowden Stott, Nicholas Jaureguy, and Maurice D. Sussman, their attorneys; the defendant appeared by Messrs. Borden Wood and Robert S. Miller, its attorneys.

Thereupon proceedings were had as follows: [1*]

*Page numbering appearing at top of page of original Reporter's Transcript.

PROCEEDINGS:

The Court: You may proceed, Gentlemen. The pre-trial order is now in?

Mr. Wood: It has been signed, your Honor.

Mr. Jones: There was discovered for the first time this morning that I knew anything about—and I think it escaped the attention of everyone else—a letter that was written to the bank on May 16th, 1939 and we have their return receipt under date of May 17th, 1939. We claim no more for it at this time than that on that date we notified the bank in writing of the losses that we were claiming and made a tender at that time of all the checks that we knew about and had discovered, in the sum of \$5611.94. We don't care if it goes in evidence or not, but the main thing we want for the letter is that on May 16th, 1939 we did notify the bank of the alleged losses, and made a demand on them for the payment, so that they wouldn't claim that there were wrong charges against the account, and we offered to tender the checks back.

Mr. Wood: Defendant admits, your Honor, that under date of May 16th, 1939 C. L. Randall, Superintendent of Claims of the plaintiff American Surety Company, wrote a letter to the defendant making claim of alleged forged checks, stating that the checks would be presented to the bank in due course, notifying the bank of Mr. Randall's company's claim of our liability—the bank's liability—in the sum of \$5611.94. [2] That seems to

be the substance of it, we admit such letter was received by the defendant the following day, May 17th, 1939.

Mr. Jones: There is this additional, Mr. Wood, that we also notified the bank at that time that we mailed notices to prior endorsers of our claims.

Mr. Wood: The letter shows that the same letter was mailed to Meier & Frank Company, Lipman Wolfe & Company, Granning & Treece, Bernice Bowman, Jay Stine, and H. J. Guindon; a copy of the letter was mailed out to all those parties, and it is mentioned in the body of the letter that copies of the letter were sent to those parties I named. The defendant admits that.

The Court: The Court will not stop now to have this put in the pre-trial order, but you may make a clerical amendment to the pre-trial order. Are there any objections now to the pre-trial order as submitted?

Mr. Wood: Not on the part of the defendant, your Honor.

Mr. Jones: Plaintiffs are satisfied with it but in putting that in, if the Court wants it in, I think that Page 61½ would be a proper place to type in the admission just made.

The Court: The Court now signs and grants the pre-trial order with this amendment. You may now proceed.

(Opening statements were thereupon made to the Court by counsel for the respective par-

ties, after which proceedings were had [3] as follows:)

Mr. Jones: I will call Mr. Johnson.

J. F. JOHNSON,

was thereupon produced as a witness in behalf of the plaintiffs herein, and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Jones:

Q. Will you give your name in full?

A. John Frederick Johnson.

Q. What is your work, Mr. Johnson?

A. Auditor.

Q. How long have you been engaged in book-keeping and auditing?

A. Since about 1922.

Q. Who are you employed with now?

A. Price, Waterhouse & Company.

Q. How long have you been employed there?

A. Since 1931.

Q. Have you ever done any auditing work for Price, Waterhouse on the accounts and records of Balfour, Guthrie and Interior Warehouse Company? A. Yes.

Q. Did you make an audit there in May, 1939?

A. I assisted in making the audit, yes. [4]

Q. What is that?

A. I assisted in making an audit.

(Testimony of J. F. Johnson.)

Q. Had you ever assisted in making other audits there?

A. Yes, for Balfour, Guthrie & Company, Limited.

Q. Prior to that time? A. That is right.

Q. As you were making the audit in May of 1939 did you in doing that reconcile the bank account of the Interior Warehouse Company?

A. Yes, I reconciled the bank account for Interior Warehouse Company.

Q. In doing that did you find any irregularity or apparently an irregularity in any of the checks or the endorsements?

A. The only apparent irregularity was an address on a check which was payable to a laborer in Eastern Washington. The address on the back on the check was the Portland address of a friend of mine.

Q. And upon finding that what did you do?

A. I looked up some other checks which were payable to this same person.

Q. And did they have the same address on them?

A. No. The checks which I found which had been issued in a prior month had been cashed in Eastern Washington.

Q. Upon discovering that what did you do?

A. I called Mr. Rawlinson. [5]

Q. Who is Mr. Rawlinson?

A. He is the assistant manager of Price, Waterhouse & Company.

(Testimony of J. F. Johnson.)

Q. Was he assistant manager then?

A. Yes, I believe so.

Q. Then did you get any orders from Mr. Rawlinson at the time?

A. Yes, Mr. Rawlinson instructed me to investigate the paid checks in the company's possession for possible irregularity along the lines of that which I had apparently discovered.

Q. Did you do that then?

A. Yes, we did.

Q. And did you later report to Mr. Rawlinson?

A. Yes.

Q. Did he come down there?

A. Yes, Mr. Rawlinson came down.

Mr. Jones: Now if the Court please, I am going to have to recall this witness again, but from this point on there are a great many questions I will have to take up with Mr. Rawlinson, and I would like to have the witness step aside, because it will go in in much more logical and chronological order if Mr. Rawlinson is allowed to testify next.

Mr. Wood: No objection on the part of the defendant.

The Court: You reserve your cross-examination?

Mr. Wood: Yes.

(Witness withdrawn.) [6]

CHARLES E. RAWLINSON,

was thereupon produced as a witness in behalf of the plaintiffs herein, and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Jones:

Q. I don't know whether they have got your full name in the record. If not, please state it.

A. Charles Ernest Rawlinson.

Q. Mr. Rawlinson, are you a certified public accountant? A. I am.

Q. How long have you been a certified public accountant? A. Since 1925.

Q. Who are you employed with?

A. Price, Waterhouse & Company.

Q. What is your position there at this time?

A. Assistant manager.

Q. How long have you been assistant manager?

A. Since 1934.

Q. Do you recall in May of 1939 receiving a telephone call from one of your associates there, Mr. Johnson? A. I do.

Q. Concerning some check irregularities at the Interior Warehouse Company? A. I do.

Q. What instructions did you give them upon the phone call? [7]

A. Well, I saw him at lunch time and went down early in the afternoon to look at the checks that he had there.

Q. After that——

(Testimony of Charles E. Rawlinson.)

A. (Interrupting): And after that I gave him instructions to get out the checks running back from that date over a period of time and select from those checks any which appeared to have endorsements where the writing to any extent corresponded with the writing on the three checks that he presented to me at that time.

Q. And did he later report to you that he had done that?

A. Well, he spent the evening doing that, and the next morning I went directly to the offices of Balfour, Guthrie and saw them.

Q. And after you had seen them what did you do? A. I talked to Mr. Crowe.

Mr. Jones: I should like to have Pre-Trial Exhibit No. 3. You may give it to the witness. If the Court please, the pre-trial order says that this Pre-Trial Exhibit No. 3, an audit of Price, Waterhouse & Company, is admitted by the defendant to be the original of such an audit without further identification, so I am offering it as evidence at this time.

Mr. Wood: The pre-trial order also says, "Subject, however, to any and all legal objections to any statement, matter or thing therein contained wherein the same is or are not supported at the trial by bank statements, original documents or [8] legally admissible testimony to be produced or supplied by plaintiffs." In this document, your Honor, you will note there are statements covering im-

(Testimony of Charles E. Rawlinson.)

proper disbursements. "We are informed by Crowe. We are told by Crowe." Attached as exhibits are calculations made by Crowe, the last four pages of allegedly false checks where allegedly the names of payees had been forged. As to so much of this audit as is a summarization of the books and records, a rule of convenience with which your Honor is quite familiar, we have no objection. As to those portions which refer to defalcations or forgeries, unless the witness knows of his own knowledge, we object on the ground of hearsay, we object on the ground of incompetency, irrelevancy, and immateriality.

Mr. Jones: If I may ask a few questions, your Honor.

Q. Mr. Rawlinson, you were up here yesterday afternoon with Mr. Stott, Mr. Jaureguy, and myself?

A. I was.

Q. Looking over these exhibits that are over on the other side of the court room there?

A. I did.

Q. Now then, the various documents and records and bank statements, and so forth, to which you refer in your audit, are they in the court room at this time?

A. It appears that they are. A volume of them, a number of them—I couldn't say directly, but from the things that I [9] looked at, they are the type of things we looked at and to a large extent the same things we looked at. There may have been others more or less.

(Testimony of Charles E. Rawlinson.)

Q. There is mention made in the pre-trial order at the bottom of Page 6 of 19 checks of which the originals were destroyed. Yesterday afternoon were you here when we were checking through the records to find if the carbon copies of those checks and the payrolls having to do with them, and so forth, and the documents and records upon which your audit concerning them is based, were here? A. I was.

Q. And are they here?

A. They appear to be.

Q. Well, do you know—Yes or No—whether those records are here or not?

A. Well, if they haven't been moved. Yesterday the very items, those that I looked at, were on the desk.

Q. We turned them back to the clerk when we left and the clerk took charge of them. Were you here then?

A. I think I had gone a few minutes before.

Q. Except for the statements which may have been made by Mr. Crowe to you orally—and maybe they are mentioned in the audit—except for any oral statements that he has made or anything like that they are here? Is that right?

A. May I have the exhibit, please? I believe the lists that [10] were made by Crowe have been placed in evidence as one of the exhibits that is included as Exhibit B here.

(Testimony of Charles E. Rawlinson.)

Mr. Jones: May I have Exhibits 4, 5, and 6? Please show Pre-Trial Exhibits 4, 5, and 6 to the witness.

The Witness: These exhibits appear to have been taken out of our working papers and placed in the record here.

Q. Are Exhibits 4, 5, and 6 the statements of Mr. Crowe which you refer to in your audit?

A. Yes, we copied these as Exhibit B into our report.

Mr. Jones: Now will you hand me Exhibit 2? I am handing the witness Exhibits 1 and 2. Mr. Rawlinson, will you open Exhibit No. 1 and identify it? I may say, the pre-trial order at this point says without qualification that Exhibit No. 1 is 107 original checks drawn on the defendant, dated October 2, 1935 to April 21, 1938, and which may be admitted without further identification.

Mr. Wood: The date is April 21, 1939. I have no objection to the introduction of these checks in evidence.

The Court: They are now admitted. The marking under these circumstances may take place later.

(A bundle of canceled checks, heretofore marked Plaintiffs' Pre-Trial Exhibit 1, was thereupon received in evidence.)

DATE Sept. 8, 1938

CASHIER: Interior Warehouse Company

No 3536

TO THE BANK OF CALIFORNIA PORTLAND, OREGON

NATIONAL ASSOCIATION
24-5 PORTLAND, OREGON

PAY TO THE ORDER OF C. W. CLARK DOLLARS \$46.78

46 78 CTS

Interior Warehouse Company

PAY CHECK

BY *C. W. Clark*

CHARLES B. HASKLEY CO. - PORTLAND, OREGON, HAS PRINTED THIS CHECK. SEE PAGE 112-123

REG. U.S. PAT. OFF.

PAY ONLY THROUGH
CLEARING HOUSE
SEP 10 1938
FIRST NATIONAL BANK
PORTLAND OREGON

46 78 CTS

PAY TO THE ORDER OF
ANY BANK, BANKER OR TRUST CO.
SEP 10 1938
BY DEPOSIT TO THE ACCOUNT OF
W. H. Kearney
W. H. Kearney
Steier & Trans Co.
PORTLAND, OREGON

DATE **APR 13, 1939** ASHED
TO **21**
THE BANK OF CALIFORNIA
NATIONAL ASSOCIATION
244 PORTLAND, OREGON

Intergr. Warehouse Company No 4996
PORTLAND, OREGON

PAY TO THE ORDER OF **C. C. ELLEDGE** FIVE HUNDRED **99** AND **00** 100/100 DOLLARS \$ **99.00**

Interior Warehouse Company

W. W. Johnson

PAY CHECK

CHARLES S. HENRY CO. PRINTERS, 107 MARKET, SAN FRANCISCO, CALIF. MADE IN U.S.A. PAT. 2,077,000

W. W. Johnson

PAY TO THE ORDER OF
FIRST NATIONAL BANK OF OREGON
APR - 4 1939
FOR DEPOSIT TO THE ACCOUNT OF
George S. Johnson
Interior Warehouse Co
PORTLAND, OREGON

4996

FIRST NATIONAL BANK
PORTLAND, OREGON
PAY ONLY THROUGH
CLEARING HOUSE
APR - 5 1939

DATE March 8rd, 1939

TO
CASHIER
THE BANK OF CALIFORNIA
NATIONAL ASSOCIATION
24-6 PORTLAND, OREGON

CASHIER
INTERIOR WAREHOUSE COMPANY
No. 4726
PORTLAND, OREGON

MAR - 9 1939

PAID THROUGH CLEARING HOUSE
11
DOLLARS \$28.50

TELEPHONED 2851028
SLOTS

PAY

TO THE ORDER OF
DICK SPERRY

Dick Sperry

Interior Warehouse Company

PAY CHECK

Dick Sperry

CHARLES BANKER CO. REGISTERED. Not Valid for Payment, see back, unless FROM ISSUING OFFICE.

REG. U.S. PAT. OFF.

N. W. Henry

[Signature]

PAY TO THE ORDER OF
BANKER TRUST CO
MAR - 8 1939
FOR DEPOSIT TO THE ACCOUNT OF
Dick Sperry
Meier & Frank Co.
PORTLAND, OREGON

PAID
11
DOLLARS \$28.50

PAID THROUGH CLEARING HOUSE
11
MAY 10 - 11 1939
PORTLAND, OREGON BANK

(Testimony of Charles E. Rawlinson.)

Mr. Jones: Refer, please, to Pre-Trial Exhibit No. 2. I have here, if the Court please, a packet of checks and drafts [11] that were called for by Mr. Wood and demanded by Mr. Wood as an exhibit, and at the time these had been removed from the bank statements we had forgotten that they were all contained in a separate little envelope, because they are originals—or they are the genuine copies of payments which were validly made to the people represented there, and Exhibit No. 2 are carbon copies of duplicates of those payments. These should have been in the bank statements which you called for and that are one of those boxes. We found them this morning as having been taken out to show to the bank, and they never were put back. Those include the genuine payments to the people that are mentioned in the 19 checks, and make the 19 check duplicates of these (indicating). You see, they were all duplicate payments.

Mr. Wood: I understand that, but these 19 original checks are still missing?

Mr. Jones: They are still missing.

Mr. Wood: And this is a carbon?

Mr. Jones: Yes.

Mr. Wood: A carbon only of the face and not the back?

Mr. Jones: That is right.

Mr. Wood: What is the purpose of these?

Mr. Jones: You called for the bank statements, and these should be with them.

(Testimony of Charles E. Rawlinson.)

Mr. Wood: It is all right with me for them to go into the [12] box.

Mr. Jones: Well, we are going to use them now. We would have had to take them out of there if they were in there. I should also like to submit a packet of drafts and checks that belong with Defendant's Pre-Trial Exhibit No. 24.

The Court: Let's have that marked in some way so we can tell what those are.

Mr. Jones: Would they be marked 24-A?

Mr. Wood: It doesn't make any difference to me.

The Court: All right, 24-A.

(A bundle of canceled checks was thereupon received in evidence and marked Plaintiffs' Exhibit 24-A.)

Q. (By Mr. Jones): Now in connection with Pre-Trial Exhibit 2 please consider Pre-Trial Exhibit 24-A. Can you tell me, Mr. Rawlinson, if you have upon Exhibit No. 2 the checks listed on the bottom of Pre-Trial Order No. 6? I think the best way is to have a copy of that pre-trial order handed to you. Would you hand him a copy of the pre-trial order?

A. Check No. 4016 is the first item listed on this.

Q. Now to shorten this up for the present purposes, were you here last night when all of those check numbers except B-15566 were identified on Pre-Trial Exhibit No. 2? A. Yes.

(Testimony of Charles E. Rawlinson.)

Q. Now then, look in at that pack of checks, 24-A, and see if you can find a check No. 15669. [13]

A. That is not in this batch that you just gave me.

Q. How is that?

A. That is not in this 24-A.

Q. In 24-A there should be a B-15669. I tell you that just to speed this up. You may look for that check at the noon hour, but except for this one check for \$43.20, both the genuine payment and the duplicate—

A. (Interrupting): The genuines are supposed to be in this group here (indicating).

Q. But the carbon copies of both the genuine and the other were picked out last night except for this one? A. Yes.

Q. Did you see the country payrolls and the dock payrolls here in the court? Are they still here? A. Yes.

Q. You may now answer whether all the documents mentioned in your audit are here.

A. To answer that directly I would have to check all the documents. For all practical purposes I would say the type of documents and the number of them—those that I saw were the documents you had. There may be other documents that you had of the same nature, but when you see a stack of payrolls that big (indicating) I am not prepared to say they are all exactly the same payrolls.

(Testimony of Charles E. Rawlinson.)

Q. To your best judgment they are all here, and they are all [14] supposed to be here? Is that right? A. Yes.

Q. Now, in making this audit, your Exhibit No. 3, the documents and so forth mentioned in there were all before you at the time, you or your assistants? A. Pardon?

Q. You had access to all those documents and were using them?

A. All these documents that you have here were all available and used by us in compiling this report.

Mr. Jones: If Mr. Wood wishes at this point to have a recess I will have Mr. Rawlinson go over everything but one of those things for the purpose of satisfying him, if he is not satisfied with the apparent showing that we have made up to this point.

Mr. Wood: I don't ask anything of that kind, your Honor. I do ask the privilege of enlarging upon the objection that I made to include the specific objection to the audit as far as bears upon the 19 missing checks, on the ground that they haven't yet shown that the originals are missing, therefore they haven't shown why they cannot produce the best evidence. The carbon copies of the 19 missing checks are not the best evidence, and are incompetent, irrelevant, and immaterial, on the ground that they are not full copies and purport to be copies of the face; they do not show the reverse in the

(Testimony of Charles E. Rawlinson.)

nature of endorsements. They haven't even yet shown that they are destroyed, so I am [15] enlarging the objection I previously made to the admission of this audit except that the audit is a summarization of what these people found themselves, and not the purported confession of Mr. Crowe.

Mr. Jones: May I ask, is your concern primarily interested as to the 19 missing checks?

Mr. Wood: No. Anything disclosed by their own audits is all right. It is pure hearsay as to what Crowe told them.

Q. (By Mr. Jones): Mr. Rawlinson, at the time you made the audit was a search made for the 19 checks? A. There was.

Q. Were you able to find the 19 checks?

A. We were not.

Q. Did the auditors and employees of the Interior Warehouse Company help you in that search?

A. They were the ones that did the searching, because the only transactions that presented any material difficulty were the transactions involving the missing checks, therefore a great deal of that time would be expended in trying to avoid unnecessary work.

Mr. Jones: Will the bailiff please hand to Mr. Rawlinson Exhibits 4, 5, and 6?

Q. Mr. Rawlinson, were they able to find and give you the originals of the 19 checks listed in the pre-trial order? A. They were not. [16]

Q. This work of making this audit was all under your own direction?

(Testimony of Charles E. Rawlinson.)

A. The direct work was under my direct instructions. Naturally Mr. McIntosh reviewed it and discussed the matter with me. Mr. McIntosh is the principal of the firm in Portland.

Q. But immediately were you——

A. (Interrupting): I was immediately in charge of this work.

Q. And the working sheets, and so forth, have been in your control since?

A. They have been in the office files.

Q. Now the 107 checks that are there in that first packet, Exhibit 1, how did you go about identifying those as forged endorsements?

A. Well, we aren't qualified to say whether it is a forged endorsement or not. That is why we used the language to which Mr. Wood took exception; that is why we used the term "improper withdrawals and irregular transactions." We are not handwriting experts, and although to a reasonable man spreading a group of these checks out and a group of the checks—we will call them authentic checks——

The Court (Interrupting): Just a moment. I think that testimony isn't admissible, as to what a reasonable man would think.

The Witness: Well, spreading out a group of these checks which appeared not to be authentic and spreading out a group [17] of checks from the same named employees which were authentic checks——

Mr. Wood (Interrupting): Just a moment. I object. May I ask a question?

(Testimony of Charles E. Rawlinson.)

The Court: No, I think you will have to object.

Mr. Wood: On the ground that that testimony is incompetent, irrelevant, and immaterial. This witness is not in position to say which is the authentic check. When checking back on other checks which he says are authentic he doesn't know whether those checks were forged or the other checks were forged.

The Court: The objection is sustained. My idea about this is that the witness is trying to testify about what the Court is going to have to find.

Q. (By Mr. Jones): Mr. Rawlinson, now the checks that had been paid were back from the bank and had been reconciled and were generally accepted by the company as proper and authentic checks. Did you have such checks before you?

A. At the time we were reviewing this problem?

Q. Yes.

A. We did.

Q. And then you compared those 107 checks and their endorsements with corresponding endorsements on the checks that were generally accepted by the company as proper?

Mr. Wood: That is the same question in another form, your Honor. I object to it on the same ground. [18]

The Court: No, he may testify whether he compared them or not.

Q. (By Mr. Jones): Did you make such a comparison? A. We did.

(Testimony of Charles E. Rawlinson.)

Q. Did you find anything on these 107 checks in that Exhibit 1 there that had any differences or apparent irregularities that you could single out?

A. There was a similarity in writing between a number of different endorsements. For instance, Joe Green, Roy Lamb, R. W. Umbarger—the writing of those checks had a similarity and the writing on other checks made out to these same individuals did not have a similarity.

Mr. Wood: I move to strike that, your Honor, because he said he is not a handwriting expert.

The Court: And furthermore there is no identification of what he is talking about. The answer is stricken.

Q. (By Mr. Jones): Now, then, did you go to the payrolls with these checks and check them against the payrolls?

A. The authentic ones or the ones that were not supposed to be authentic?

Q. These 107 checks, Exhibit No. 1.

A. Did we check them actually with the payrolls?

Q. Yes, did you find a man's name on the payroll to correspond with it?

A. We did. There might be exceptions where the names would [19] be there but the men might have been changed from one column to another.

Q. Did you find that the same men had been paid for the same period of time on other payrolls close to them? A. We did.

(Testimony of Charles E. Rawlinson.)

Q. Did you find authentic checks for the payments to the man at that time? A. We did.

Q. What general method of accomplishing this duplication did you find?

The Court: Now, just a moment, Mr. Jones. I want to determine in my own mind; is that applying to the 19 or applying to the whole 107?

Mr. Jones: I think the whole 126. The question will apply equally to all 126, but I am directing it only to the 107. I am talking now about the 107 checks that he has there.

The Court: Well, you used the word "duplication." I didn't know there was any duplication as to the 107. I thought that was as to the 19.

Q. (By Mr. Jones): Will you explain that point?

A. There was duplication. On Exhibit A of your Pre-Trial Exhibit No. 3 we listed the various types of transactions. The first grouping was checks negotiated in Portland which had been made payable to names inserted on the dock payroll, such names not appearing on the carbon copy of the payroll [20] retained at the dock office where the payroll had been prepared. That is one group of transactions. The second group is checks negotiated in Portland which had been written payable to employees listed on the dock payroll, such employees actually having been paid by other checks or in cash. The endorsements on the checks listed do not correspond with the signatures of the employees. The

(Testimony of Charles E. Rawlinson.)

third group, checks negotiated in Portland which had been written payable to country employees who were actually paid by other checks drawn in Portland. Six exceptions noted. I might say at this time that each of these groups is supported by a detailed itemized list.

Mr. Wood: I renew my objection, not only to the audit itself but that very testimony read out of the audit. He is just reading from the audit.

The Witness: Well, do you object to saying "checks negotiated in Portland"?

The Court: Just a minute now; you are the witness. I will strike that portion that relates to the signatures not being the same. That is a determination that the Court will have to make.

Q. (By Mr. Jones): Now, without passing judgment upon the differences that you found, go ahead and explain the other two groupings and what points you observed there, but don't pass judgment on it like you did in this last one. [21]

A. Checks negotiated in Portland which had been written payable to country employees who were actually paid by drafts issued by country agents. Two exceptions noted. Amounts charged by the bank on the company's bank statements showing payments where paid checks as evidence thereof are not available, possibly destroyed, and company's carbon copies of the numbered checks indicate, one, that the items were in payment for services which were paid for by other checks or

(Testimony of Charles E. Rawlinson.)

drafts, and two, that the checks had been voided after their preparation.

Q. Now, Mr. Rawlinson, when you got all through with your work and finished that report verifying your work, your conclusions that are expressed in there, from all information that was available to you at the time was the total amount that you believe were the checks that were wrongfully charged?

Mr. Wood: I object to that as calling for a conclusion of the witness as to whether they were properly drawn or improperly drawn, and as being incompetent, irrelevant, and immaterial, and I object to that further portion read from his audit in the record.

Mr. Jones: We don't need it. We can add them up on an adding machine. It is just to save time.

Mr. Wood: Mr. Jones, I am perfectly willing to take the total of the 126 checks or the 19. I have no objection to that.

Q. (By Mr. Jones): Do you want to tell the total of all 126 [22] checks, and then separately the total of the 19 checks?

A. \$6562.33 is the total of the 126 checks; \$950.39 is the total of the 19 checks.

Q. Mr. Rawlinson, after you had started in on this I suppose you talked to the officers of the Interior Warehouse Company and Balfour, Guthrie about what you were finding.

A. Oh, yes, prior to actually commencing this

(Testimony of Charles E. Rawlinson.)

work I discussed the matter with Mr. MacGregor and received his instructions to make this examination.

Q. Their chief accounting officer down there is who?
A. Mr. Lawson.

Q. Did you talk the matter over with him?

A. I did.

Q. Did you also talk with Mr. Crowe as you went along with this work?

A. He was available. It helped, having him available. It would have made no difference to the results, of course.

Q. But he was there, was he?

A. He was there part of the time, or he was on call. He wasn't there for days on end, but if we needed him he made himself available.

Q. And did you or your assistants or under your direction—were all of these checks that you are of the opinion were not properly drawn, were they talked of and discussed with him?

A. They were. [23]

Mr. Wood: I object to that as calling for a conclusion of the witness, whether they were properly drawn or not.

The Court: No, I don't think falls under opinion. It is just a question whether he talked to him about it. He may answer.

Q. (By Mr. Jones): I just want to know if you discussed it with him.

A. They were discussed.

(Testimony of Charles E. Rawlinson.)

Q. Did you discuss those things with Mr. Crowe?

A. We did.

Q. Are the conclusions that you have in that report, your audit, supported by documentary evidence?

A. As regards the 19 checks it is the type of evidence which accountants would accept and consider, but whether that could be termed documentary evidence is a matter on which I wouldn't say.

Q. Well, you have got that Exhibit No. 2 there, haven't you?

A. Yes, that is part of the evidence upon which we relied.

Q. Now, the statements that you have got there—the conclusions you have made, I mean to say—are they supported by the documentary evidence we are referring to? A. They are.

Q. Would your conclusions have been the same without having Mr. Crowe available for conversation? A. They would. [24]

Q. Could you have arrived at the same results without him as with him? A. We could.

Mr. Jones: There are two men here that I don't want to have to call back this afternoon. I have just got about two questions apiece. They were the two signing officers of the warehouse company, and I would like if I could to ask them two questions apiece so they won't have to come back. May I?

The Court: Well, I don't want to break into this. Go ahead, and call the witness when you get to him.

(Testimony of Charles E. Rawlinson.)

I am only interested in the order of proof; I am not interested in what witnesses have to be called.

Mr. Jones: You may cross-examine.

Mr. Wood: Mr. Jones, do I understand that the only exhibit which was admitted was No. 1, the 107 checks that you offered, or did you offer only the audit?

Mr. Jones: I have brought the audit but I am not insisting on that offer at the present time. I am going to follow it up with some more evidence.

Cross-Examination

By Mr. Wood:

Q. Mr. Rawlinson, isn't it a fact that all of the material that you have in this audit was obtained by reason of talking to Crowe?

A. It was not. [25]

Q. How could you have compiled this audit without his assistance in pointing out these alleged defalcations to you?

A. As far as the checks were concerned, they were sorted out without Crowe's assistance and shown to him afterwards.

Q. But wasn't it he that mentioned specific checks that he might have claimed were improper in some respects?

A. That he mentioned any specific check?

Q. Yes, didn't Crowe do that?

A. I don't know the number, but probably out of the 107 checks 105, or over 100 of them, were

(Testimony of Charles E. Rawlinson.)

obtained before we had an opportunity—or took an opportunity to talk to Mr. Crowe.

Q. And yet it was Crowe's alleged confession that started you on this special work, wasn't it?

A. Naturally the first thing to do when you have something like that is to discuss it with the man in question. I discussed it with him.

Q. You wouldn't have started in this special work of this audit except for what Crowe had told you?

A. We already had the evidence in our hands to go ahead with that work. If he had walked out of the office that night and never was seen since it wouldn't have made any difference. It would have been a little more expensive to follow the missing checks, but where there were two checks, as far as those particular checks are concerned it wouldn't have made any [26] difference.

Q. Well, if you could have done it without Crowe's assistance in '39 why couldn't you have done it in '38, '37, and '36?

A. This similarity of names and what not was observed in 1939 because a group of checks happened to come showing approximately the same writing.

Q. And that didn't occur in '38, '7, and '6?

A. No.

Q. In those years did you reconcile checks against payrolls and the timebook?

A. We did.

(Testimony of Charles E. Rawlinson.)

Q. Isn't it a fact that Crowe didn't add any names to the timebook?

A. No, it is not a fact. He did.

Q. He did add some names?

A. I think there was only one or two names added to the time book. Are you referring to the dock payrolls?

Q. No, I am referring to the superintendent's timebook.

A. He did add names. In the exhibit, Schedule 1, you will observe in there that the name C. W. Clark—there were two names really used, Clark and Carey. The same name was apparently used, and inserted.

Q. Did you make that check each year that you made this audit—check the checks back against the payrolls?

A. We did. The names were on the payrolls and they were in the [27] dock time book.

Q. Well, that was true of these 107 checks too? The names did appear in there too, didn't they?

A. You are dealing with two groups; one, the dock payroll, and the other, the country payroll.

Q. Such portion of the 107 as relate to the dock, those names appeared on the dock payroll, didn't they?

A. They did on the office copy, the copy that came up to the office.

Q. That was in '39? A. Yes.

Q. And the same thing obtained in '38?

(Testimony of Charles E. Rawlinson.)

A. It did.

Q. In '37? A. It did.

Q. '36? A. It did.

Q. What was the difference in '39, '38, '7, and '6? If the signatures were all checked back each year why was there any such irregularity in '39? Why didn't you pick it up in a prior year?

A. When one check or a group of checks comes to your attention you scrutinize the endorsements. If there is an endorsement on the back we assume that that endorsement has been checked by the bank. [28]

Q. It is not part of the audit to check that?

A. Purely to check that there is an endorsement. Whether it is a good endorsement or a bad endorsement is beyond our work.

Q. When did you make your audits each year? They were annual audits each year, weren't they?

A. The examination of Balfour, Guthrie and its subsidiaries, which includes Interior Warehouse Company, is conducted annually, about March 31st.

Q. Which month?

A. At March 31st. The work is done between March and June 30th.

Q. After September 1, 1935—that is the date of the first alleged defalcation—you would have an audit for March 31 in '36, March 31 in '37, and in '38; is that it?

A. We did. Are you attempting to discuss the scope of the audit?

(Testimony of Charles E. Rawlinson.)

Q. Well, was it the same audit as in '39?

A. Not the same type of work that we do in an investigation of this nature.

Q. These alleged defalcations were going on in those years? A. They were.

Q. And you made the same check that you did in '39 in those prior years? A. We did.

Q. And you never discovered it? [29]

A. No.

Q. Did you at any time during those years advise the Interior to change its bookkeeping system in any respect?

A. To change their accounting procedures?

Q. Yes.

A. It quite often occurs at the end of the audit that we write a letter making certain suggestions for certain changes.

Q. This system of the Interior is about a forty-year old system, isn't it?

A. The system as a whole?

Q. Yes. A. No.

Q. It is a pretty old system, isn't it?

A. There were certain material changes made in 1933 or so, but insofar as the payrolls were concerned I don't think there was any change. It wasn't necessary.

Q. You knew all during these years that you were making these audits that Crowe drew these checks, didn't you? A. We did.

Q. He was payroll clerk?

(Testimony of Charles E. Rawlinson.)

A. Well, he was general bookkeeper for Interior, and one of those duties included the preparation of these checks—or under his direction.

Q. He worked for Balfour, Guthrie also, didn't he?

A. He did a certain amount of work for them.

[30]

Q. And you knew he was drawing these checks?

A. He was.

Q. All during this period? A. Yes.

Q. And you knew he was taking them to just one officer of the Interior for signing?

A. One or two or three, perhaps.

Q. Well, only one signature would appear?

A. The individual checks were going to only one officer.

Q. You knew during the course of those years that those checks after they were signed by the officer were redelivered to Crowe?

A. That wouldn't be to my own knowledge.

Q. Had you been so informed?

A. Pardon?

Q. In the course of making these audits had you been informed that that was the procedure?

The Court: Just a minute. If you are going into that phase of it I am going to open it up on the other side. If you are going to rely in cross-examination on the hearsay side of this thing then I am going to permit the other side to go into it.

Mr. Wood: I think that is correct, your Honor.

(Testimony of Charles E. Rawlinson.)

I thought that might be in the nature of an admission, but I will withdraw it. [31]

Q. Did you during the course of these years I have mentioned at any time advise these people to put another man on with Crowe so as to afford a system of checks and balances against him?

A. As regards the accounting for Interior Warehouse itself?

Q. Yes.

A. The general accounting for Interior Warehouse was not sufficient to warrant a division of the ordinary duties there, but we had advised and suggested that somebody else reconcile the bank accounts.

Q. Crowe was reconciling the bank accounts all these years, wasn't he?

A. Well, our observation led us to believe in the month that we checked that he had reconciled the bank account.

Q. And you made that recommendation to the Interior? A. We had done it.

Q. About what year did you do that? On which audit?

A. Sometimes those recommendations are verbal and sometimes they are in writing. This particular point I believe was put in writing in 1938.

Q. That was not done, was it, until after Crowe left the employ of the Interior?

A. You will have to ask them that question.

Q. Do you know of your own knowledge that as soon as Crowe was discharged they immediately

(Testimony of Charles E. Rawlinson.)

put two men on that system so that [32] one could check the other?

Mr. Jones: If the Court please, I think that is irrelevant and immaterial.

The Court: Yes, the basis on which you are examining him now seems to be on theory of negligence, and the subsequent act to take care of negligence that has happened previously is never competent.

Mr. Wood: I think this is directed more to our defense anyhow, your Honor. I withdraw that question.

Q. You say in making these audits you would check against the payroll and you found the amounts different sometimes on the payroll as against the checks?

A. Are you talking about this examination now?

Q. At any time did you find that? Did you find it before '39?

A. No.

Q. Just in '39 you found that? Is that right?

A. Yes.

Q. And on previous audits you never found any discrepancies between canceled checks and the names on the payrolls and the amounts after the names?

A. No. The examination of Interior Warehouse Company is quite a limited examination as a subsidiary of a large group of companies. It merely comes in for such check as is necessary. You have to consider the substantial accuracy of the accounts

(Testimony of Charles E. Rawlinson.)

as a whole. The items in here, as you will observe, are all [33] small items, and in a subsidiary like this items below a certain amount very often don't come under our scrutiny, that is, as regards the general entries in the books. If you are checking a payroll you naturally check the individual checks—or a bank account.

Q. In auditing in '36, '37, and '38 did you find any duplicate checks issued to a single laborer?

A. No, we didn't observe any within the periods that were checked by us.

Q. Preparatory to your audits of those years did you make such a check?

A. I believe in that period we reconciled the bank account for one month.

Q. That is what you call a test check, isn't it?

A. Yes, and within that period, a very good example of that, Clarkson's name might have been in that period. Well, he wouldn't be a duplication; he would be an insertion on the payroll. That is Exhibit Schedule 1.

Q. Did you go back any of those years and check against the original time kept by the dock superintendent, the timebook?

A. We did for the month that was test checked by us. We checked the payroll of one month and we checked back from the copy of the payroll in the office back against—test checked the details in the timebook for the number of hours of the individual employees working. They don't use the time card system. [34]

(Testimony of Charles E. Rawlinson.)

Q. Did you complete your answer? I didn't mean to interrupt you.

A. I say, they don't use a time card system; they use this book that you refer to as the time book, which is maintained by the dock superintendent.

Q. Can you tell us which month you made that check in? A. Each given year?

Q. Yes.

A. I wouldn't be prepared to say offhand without going back through the papers.

Q. It would be just one month out of the twelve?

A. Yes.

Q. And that check would include a check against the book that the superintendent kept?

A. It would.

Q. And against the payroll sheet that came to the office? A. Yes.

Q. Both country and dock?

A. The country wouldn't have those.

Q. The country wouldn't have payroll sheets?

A. No, they wouldn't have a time book. The country payrolls are usually from one to three employees on each, and they don't have that.

Q. Distinguishing the time book such as the one kept by the superintendent on the dock from the payroll sheets themselves, [35] both the dock and the country warehouses furnished the originals of those payroll sheets to the head office here, didn't they? A. Yes.

(Testimony of Charles E. Rawlinson.)

Q. And you checked against those?

A. Yes.

Q. But in each instance a carbon of those payroll sheets was retained in the country or on the dock, as the case may be? A. It was.

Q. Did you inspect the carbons? A. No.

Q. You don't know whether any alterations appeared on the carbons or not? A. Erasures?

Q. Any alterations appearing on the carbons of the payroll sheets.

A. No. Oh, since the examination we have made that comparison of this Clarkson, and so on, and so forth, on Schedule 1. Those items do not appear on the dock copy of the payroll.

Q. So you know now from examination that you have made since that there were no changes or alterations made on the carbons of the payroll sheets? Is that correct?

A. Well, I wouldn't be prepared to say whether there were or there weren't.

Q. Did you ever check the original payroll sheets back with [36] the carbons of the payroll sheets?

A. Did we?

Q. Yes, at any time.

A. You mean as part of our orderly procedure, or in connection with the examination?

Q. At that time, or subsequent, or at any time at all?

A. We did in connection with this examination, and we found that this list of checks was not on the dock copy of the payroll.

(Testimony of Charles E. Rawlinson.)

Q. And not on the carbon copy? A. No.

Q. And in the case of the country warehouses, not on the carbon retained by the country warehouse?

A. Well, the country situation is a little different. Some of those country payrolls were made up by somebody other than the country agent in such writing that you couldn't tell the difference.

Q. Then take the dock payrolls. These changes that you speak of that appeared on the originals were not carried forward on the carbon?

A. No.

Q. And you didn't call for the carbons at any time during your audit?

A. No. We called for the time book, the original record from which the payroll was made up, and the names had been inserted [37] in the book.

Q. You don't know of your own knowledge who made those insertions, do you? A. No.

Q. They could have been made by the dock superintendent himself, could they not?

A. It is possible.

Q. As far as your own knowledge on that score would extend, they might have been actual laborers who put in time represented by the name and the time that appeared there?

A. They might, although the conclusion doesn't appear very sound. If the dock superintendent were going to change that he would change his carbon copy of the payroll. That is his fundamental, at

(Testimony of Charles E. Rawlinson.)

least his basic record, is the carbon copy of the payroll, of which he sends the original up to the office.

Q. That would be the normal procedure?

A. Yes, and if he were going to change anything he would change his copy.

Q. In accounting practice is it considered proper and good accounting in making these audits to check back against those original timebooks and those original time sheets?

Mr. Jones: Just a minute; I object to that, your Honor, as calling for the conclusion of the witness and not within the scope of the direct examination and defendant's case on negligence as made in his answer. [38]

The Court: Objection sustained.

Q. (By Mr. Wood): Did you notice in making any of these audits a large number of checks which were voided in the checkbook?

A. There weren't a large number of checks that were voided. Every company has some checks that were voided. Sometimes it is carelessness on the part of employees; sometimes they destroy them and sometimes they retain them. Some companies retain them and some companies don't.

Q. Weren't there quite a number in this case, Mr. Rawlinson?

A. I wouldn't say that there was an abnormal number. The number of checks voided that way depends quite often on the carelessness or the efficiency of a girl making out payrolls. If you have

(Testimony of Charles E. Rawlinson.)

got a new girl on a payroll she will ruin more checks than a girl who had been on the job for years.

Q. Was there a girl on the payroll under Crowe's direction, or did he type all those?

A. I couldn't say that myself.

Q. Did you check those void checks against the bank statement? Would that give you any information on your audit?

A. Check the void check against the bank statement?

Q. Or against the payroll itself? Did you check the void check against the payroll itself? Would that give you any information on your audit?

A. The check wouldn't be there, and somebody would say the check was voided, and that would be the end of it. [39]

Q. Would it show whether it was a large number or a small number?

A. There was no particular suspicion aroused by having a check marked void.

Q. No, but the number you did find in here——

A. (Interrupting): I say, in this particular case the number of voided checks in this company never struck me as being out of the way.

Q. Well, in any of those cases of void checks would the payroll sheet show that the employee had been paid another or a different check?

A. No such particular instance came to our attention in the particular periods that were test checked by us.

(Testimony of Charles E. Rawlinson.)

Q. How about the very same check itself, a voided check? Would the payroll show that the man had been paid and the check not actually voided?

A. Well, all I can say to that is, as far as we were concerned in the period of our test checks we never happened to run into it.

Q. Were the voided checks themselves put back into the book or just voided on the stub?

A. I don't know with this particular company. I wouldn't be prepared to say whether they do or don't. Some companies do and some don't.

Q. Were there any other records or registers against which you [40] could check the payroll sheets, other than the dock payrolls?

A. The carbon copies of the checks that we are talking about.

Q. There would be no separate register?

A. No.

Mr. Wood: That is all.

Mr. Jones: No further examination.

(Witness excused.)

The Court: If you desire now, Mr. Jones, you may call these witnesses.

Mr. Jones: Yes, I would like to.

Mr. Wood: If your Honor please, I can make a statement that may save everybody's time. Both of these men are under subpoena by the defense, and they will be here.

Mr. Jones: Well, I only have a question or two

apiece, and you wouldn't need to bring them back until you wanted to call them.

Mr. Wood: That may save them some time.

Mr. Jones: Mr. Chrystall. [41]

A. M. CHRYSTALL

was thereupon produced as a witness in behalf of the plaintiffs herein, and having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Jones:

Q. Mr. Chrystall, will you state your full name into the record? A. A. M. Chrystall.

Q. What is your position, Mr. Chrystall?

A. In charge of the grain and the country end of it.

Q. For Balfour, Guthrie? A. Yes.

Q. Now this Interior Warehouse Company which is a subsidiary of Balfour, Guthrie, what is its chief purpose and function? Why do you have it?

A. We buy all our grain through it in the country.

Q. In 1935 to 1939 were you in the same position that you have now?

A. No, not quite. I have another position in addition to that.

Q. Well, as far as the Interior Warehouse Company is concerned is your position the same?

(Testimony of A. M. Chrystall.)

A. Yes.

Q. And during those years did you have authority to sign checks? A. Yes.

Q. Now who in principal signed the Interior Warehouse Company [42] payroll checks—in general? You and who else?

A. Myself and Mr. Lawson.

Q. Mr. Crowe as bookkeeper for the Interior Warehouse Company, after he had had checks prepared, would come to either of you people for signature? A. Yes.

Q. When he came in to get your signature on the check what did he bring with him besides the checks? A. He brought the payroll.

Q. Or a bill, or some supporting document of some kind? A. Yes.

Q. When he would bring these in would it be with a request that you sign, or how would that transaction take place?

A. He brought down these checks for the purpose of being signed, and naturally the payroll was signed by the dock superintendent or the country agent, the extensions were all checked, and I signed the checks.

Q. Now when you signed a check that he would bring in to you, accompanied by a payroll, who did you intend the check that you were signing would be for? A. To the man who earned it.

Q. What?

A. To the fellow who earned it.

(Testimony of A. M. Chrystall.)

Q. The payee named in the check?

A. Sure. [43]

Q. Did you intend that any of those checks would go to and become the property and money of Mr. Crowe? A. No.

Q. Did you have any knowledge or any notice of any kind prior to May of 1939 that any of these checks that you or Mr. Lawson or anybody else down there was signing were not going to the payees named in them? A. No notice.

Mr. Jones: Now I promise to connect this up by later witnesses, and if I should fail in my attempt it may be stricken, but I should like to ask a question or two on the assumption that these are forgeries.

Q. Did you have any knowledge or notice of any kind that he was endorsing or writing the payee's name on those checks and cashing them?

A. No.

Mr. Wood: I object to that on the ground that it is incompetent, irrelevant, and immaterial, and assumes a fact not in issue here and a fact not proved.

Mr. Jones: I had just made the statement, your Honor, that that could be stricken if I failed to connect it up by later testimony. I have got to get this testimony out of these two witnesses here that they had no knowledge of such practice.

The Court: Well, I think it is incompetent for them to say [44] that they had no knowledge of any

(Testimony of A. M. Chrystall.)

such practice, irrespective of whether it is connected up later or not, but I am not quite sure that that is the question you asked.

Mr. Jones: Would you read the question back?

(The question and answer were read.)

The Court: I was mistaken. I overrule the objection.

Q. (By Mr. Jones): If any payees in any of the 126 checks with which we are concerned here were not actually existing people, or what are sometimes referred to as fictitious persons, did you have any knowledge of that at the time you signed a check? A. No.

Q. In other words you thought that each payee was an existing person that was entitled to the money? A. Yes.

Mr. Jones: That is all. You may cross-examine.

Cross-Examination

By Mr. Wood:

Q. Mr. Chrystall, as far as your own knowledge goes each and every payee named in those checks actually got the money, did they not?

A. I didn't understand your question.

Q. As far as your own knowledge goes each man named in each one of those checks—you intended each should receive that money, didn't you?

A. That was the intention. [45]

Q. And as far as you know of your own knowledge he did receive it?

A. At that time, yes.

(Testimony of A. M. Chrystall.)

Q. Now when Mr. Crowe would bring you these checks and bring the payrolls along with them would you examine the payroll sheet yourself?

A. I saw that they were properly signed by the dock superintendent or the country agent.

Q. Did you go over it for any alterations or erasures or changes? A. No.

Q. You didn't check that? Is that right?

A. I did not.

Q. You just checked to see that the dock superintendent or the man in charge of the country warehouse had initialed them or signed them or approved them?

A. That he had signed the payrolls and that the payrolls had been checked in the office for extensions, and so forth.

Q. And as you signed the checks would you check each one back against the payrolls to see that the man's name and amount were correct?

A. I would go through them sometimes, and sometimes just sign them.

Q. And in doing that did you ever find two checks to a man for the same amount?

A. No. [46]

Mr. Wood: That is all.

Mr. Jones: That is all.

(Witness excused.) [47]

J. B. W. LAWSON

was thereupon produced as a witness in behalf of the plaintiffs herein, and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Jones:

Q. Mr. Lawson, state your name in full for the record, please. A. J. B. W. Lawson.

Q. Mr. Lawson, what is your position?

A. An accountant with Balfour, Guthrie & Company.

Q. And as such are you authorized to sign checks for the Interior Warehouse Company?

A. Yes.

Q. Were you during the years 1935 to '39, inclusive? A. Yes.

Q. During that time Mr. Crowe was bookkeeper and would bring the payrolls and expenses of the Interior Warehouse to you with checks that he had had made out for signing? A. He would.

Q. To you or Mr. Chrystall? A. Right.

Q. When he brought them what would they be accompanied by?

A. He brought the payrolls with the checks.

Q. And you would sign the checks then?

A. Yes.

Q. What conversations, if any, would take place between you and [48] Mr. Crowe on such occasions?

Mr. Wood: What conversations?

Mr. Jones: Yes, what conversations would take place?

(Testimony of J. B. W. Lawson.)

Mr. Wood: I object to that as not binding upon the defendant.

Mr. Jones: Maybe it isn't.

The Court: Well, I think if you insist it is admissible.

Mr. Jones: I know it is, but I want to get at it in a different way, if your Honor please.

Q. These dock payrolls and the country payrolls would accompany his checks that were made out to your desk?

A. They were clipped together.

Q. And would he come with them?

A. Yes.

Q. When you signed those checks who did you intend them for? A. The payees.

Q. And did you have any knowledge at the time, assuming for the purpose of this question that Mr. Crowe did endorse some of those checks and sign the payee's name on them—did you have any knowledge that he was doing it? A. No.

Q. Did you know that he obtained any of the money of those checks prior to May of 1939?

The Court: Just a moment. That is the question I thought you asked before. I am going to strike out this matter of [49] assuming that he did certain things. I want you to proceed on the line of whether he knew or not.

Q. (By Mr. Jones): Did you know prior to May of 1939 whether Mr. Crowe was signing the payee's name of any of those checks and obtaining money on them himself?

(Testimony of J. B. W. Lawson.)

A. Do you mean endorsing them?

Q. Endorsing them.

A. No, I didn't know that.

Q. Did you intend any of the money to be for Mr. Crowe when you signed those checks?

A. No.

Q. What would be said between you and Mr. Crowe at the time that he would come in with those checks?

A. Nothing would be said at all except, "Here are the checks." That was all.

Q. It was just done in the regular course of business? A. Yes.

Q. You believing that they were proper checks and that you owed the money to those people?

A. Exactly.

The Court: At this time I want to make the ruling definite. I now strike from the record the question and answer assuming that Mr. Crowe did certain things, so the record will show that that is stricken.

Q. (By Mr. Jones): You thought in each instance that you [50] signed a check that your company actually owed the payee named therein the money? A. Yes.

Q. Now if there were any fictitious persons to whom any of those checks were made out—and by that term I mean people that weren't actually in existence that were named in there as payees—did you know that they were non-existent or fictitious persons? A. I didn't know.

(Testimony of J. B. W. Lawson.)

Mr. Jones: You may cross-examine.

Cross-Examination

By Mr. Wood:

Q. Mr. Lawson, in signing these checks would you compare the names and amounts back against the payroll?

A. Each name and each check down the list, one by one.

Q. And in addition to that did you notice the payroll as to whether there were any erasures or alterations appearing thereon?

A. I didn't notice.

Q. Did you examine specifically for that?

A. No.

Mr. Wood: That is all.

Redirect Examination

By Mr. Jones:

Q. There is one more question. Did Mr. Thom of the [51] Bank of California ever come to your office in May of 1939 or thereabouts and shortly after these losses were discovered to talk them over?

A. Yes, I would say that was in May.

Q. In May?

A. I think it would be in May. It was shortly after this thing was discovered.

Q. And the whole affair was discussed. Did he see the checks at that time?

A. I think he saw the checks. I think that is what he came for.

(Testimony of J. B. W. Lawson.)

Mr. Jones: That is all.

Mr. Wood: That is all, Mr. Lawson, except that you are under subpoena for this afternoon.

The Witness: Two o'clock. All right.

(Witness excused.)

Mr. Jones: There are no more that we have to take before twelve.

The Court: Court is in recess until two o'clock.

(Thereupon, at 12:20 o'clock P.M., March 26, 1941 a recess was taken until 2:00 P.M. of the same date.) [52]

Portland, Oregon, March 26, 1941.

2:00 o'clock P.M.

(After Recess.)

Mr. Jones: If the Court please, I brought Mr. Johnson back for cross-examination. There are no further questions that we are going to ask. You may take the witness stand.

J. F. JOHNSON

was thereupon recalled as a witness in behalf of the plaintiffs herein, and testified further as follows:

Cross-Examination

By Mr. Wood:

Q. Your testimony as I remember it, Mr. Johnson, was that you assisted in making the May, '39 audit. Is that right?

(Testimony of J. F. Johnson.)

A. Well, I was working there in May, 1939. The audit was actually as of March 31, 1939.

Q. But that particular audit you did assist in making? A. Yes.

Q. Had you assisted in making the 1938 audit also?

A. I assisted on the Balfour, Guthrie audit. I don't recall that I did any work on the Interior Warehouse Company.

Q. How about '37 and '36? Do you remember about those?

A. Well, I think the same situation was true, that I did work on the Balfour, Guthrie audit in each of those years.

Q. You heard the testimony about the test checks made, Mr. Rawlinson's testimony about test checks? [53]

A. I beg your pardon?

Q. The test check that you had made, you heard his testimony about that, that each year in making the Interior audit he would take a month—he didn't remember the month—and make test checks on that.

A. Yes, I heard that.

Q. And you know that was done of your own knowledge?

A. Well, I reconciled the bank account for the month of March, 1939.

Q. In reconciling that bank account did you have occasion to notice on these copies of these 19 missing checks that some of them had been voided, marked void on the copy?

(Testimony of J. F. Johnson.)

A. Well, if I understand correctly these 19 missing checks you refer to had not been issued in the month of March, 1939.

Q. That is correct. Some of that was in '35 and '38, as I remember. Did you make test checks in those years? A. No, I didn't myself.

Q. You didn't do that yourself? A. No.

Q. You heard Mr. Rawlinson's testimony that even without Crowe's assistance the data of this audit of '39 could have been compiled?

A. Yes, I heard that.

Q. Would that be true also of 1938?

A. Would you repeat the question again, please? [54]

Mr. Wood: Would you read that to him, Mr. Reporter?

(The question was read by the reporter.)

Mr. Jones: We object to that on two grounds; first, it is entirely out of the scope of the direct examination; on the second ground, we don't know exactly what Mr. Rawlinson had in mind in making that. It isn't this man's testimony.

The Court: I think that is always improper, to base the question on the testimony of another witness. I will strike the question and the answer.

Q. (By Mr. Wood): You participated in getting up the 1938 audit for the Interior?

A. I may have done some of the work, I don't recall just now, but I definitely had no work on the bank accounts for 1938.

Mr. Wood: That is all.

Mr. Jones: Thank you. That is all, Mr. Johnson.
(Witness excused.) [55]

R. G. GRIFFIS

was thereupon produced as a witness in behalf of the plaintiffs herein, and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Jones:

Q. Will you state your full name into the record?

A. R. G. Griffis.

Q. And what is your position?

A. I am now employed by Balfour, Guthrie & Company.

Q. In what capacity? A. As accountant.

Q. How long have you been with them?

A. Since June, 1939.

Q. Where were you employed prior to that time?

A. Price, Waterhouse & Company.

Q. Did you have any work at all on this audit or this report that Price, Waterhouse got out on the matter that we are in controversy here today?

A. Yes, I was under Mr. Johnson.

Q. Now I am handing you Plaintiffs' Exhibits 15, 16, and 17. First I will take 15, which in the pre-trial order is referred to as copy of Page 32, cash receipts, August, 1939, defendant admitting au-

(Testimony of R. G. Griffis.)

thenticity and waiving objection that the original was not produced, but reserving the right to object on the ground of materiality, competency, and relevancy. The authen- [56] ticity, your Honor, has been admitted, and that is the original of cash receipts of the Interior Warehouse, or Balfour, Guthrie.

A. This is a copy of a page from the cash receipts of Balfour, Guthrie & Company.

Q. And there is an item on there affecting some receipts that were put into the Interior Warehouse. Will you point out what item that is, or check it?

The Court: I will take a recess at this time.

(A recess was then taken, after which proceedings were resumed as follows:)

Q. (By Mr. Jones): At the time that this loss that we are concerned with was paid by the two companies, Lloyds and American Surety, you were employed by Balfour, Guthrie? A. I was.

Q. And did you see the checks that came in?

A. Yes.

Q. I want you to refer to Exhibits 12, 13, and 13-A. Are those the checks which your company received in payment of the total claim?

A. They are.

Q. Now then, will you refer again to Exhibits 15, 16, and 17, taking up again Exhibit 15? You had stated, I believe, that that was a copy of Page 32 of the cash receipts of Balfour, Guthrie. [57]

A. Yes.

(Testimony of R. G. Griffis.)

Q. Does it show a receipt by that company of some \$5500? A. It does.

Q. Is it one of those checks there? A. Yes.

Q. What exhibit number?

A. It is Pre-Trial Exhibit No. 12.

Q. And the amount of Pre-Trial Exhibit No. 12 is shown as a receipt of Balfour, Guthrie & Company on Pre-Trial Exhibit No. 15?

A. That is right.

Q. Now take Pre-Trial Exhibit No. 13. Is that a check that also came in on this loss? A. Yes.

Q. And how much is it for?

A. That is for ten dollars.

Q. Now refer to Pre-Trial Exhibit 16.

A. That is recording the receipt of this ten dollars.

Q. And shows as a receipt on the company's books? A. Yes, it does.

Q. All right, now, take your Pre-Trial Exhibit No. 13. That is a check for a thousand, is it?

A. Yes.

Q. From the American Surety Company?

A. From American Surety Company. [58]

Q. Now take Pre-Trial Exhibit 17. The pre-trial order says that that is a copy of a tabulation headed "Balfour, Guthrie & Company, Limited, Portland, Oregon, cash receipt dated June 8"—

A. (Interrupting): That is right.

Q. "June 8, 1939, defendant admitting the authenticity and waiving the objection that the origi-

(Testimony of R. G. Griffis.)

nal was not produced, but reserving rights for relevancy", and so forth. Does that show the receipt to Balfour, Guthrie of the thousand dollar check?

A. It does.

Q. And by the way, what was the amount of the first check, No. 12, Pre-Trial Exhibit 12?

A. Twelve was \$5542.

Mr. Jones: That is all. You may cross-examine.

Mr. Wood: Don't you want to introduce those in evidence, Mr. Jones?

Mr. Jones: Well, I thought I would finish up my case and stick them all in at the same time, because you have admitted authenticity in each case.

Mr. Wood: That is right.

Mr. Jones: I am going to offer them all, but I will wait until I call my last witness. Mr. Crowe.

(Witness withdrawn.) [59]

G. L. CROWE

was thereupon produced as a witness in behalf of the plaintiffs herein, and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Jones:

Q. Mr. Crowe, will you state your name in full for the record? A. Garth L. Crowe.

Q. Did you take a course in bookkeeping at some school? A. I did.

(Testimony of G. L. Crowe.)

Q. What school?

A. Central Business College.

Q. And when did you finish that course?

A. In 1920.

Q. What did you do from 1920 to 1925?

A. I was employed by the Hawkins Mortgage Company of Portland, Indiana.

Q. During 1926 what did you do?

A. I worked for the Western Union Telegraph Company.

Q. In those two jobs last mentioned were you in the auditing and bookkeeping departments?

A. I was with Western Union. I did some book-keeping for the Hawkins Mortgage Company.

Q. From 1926 to 1928 you were with Western Union? A. Yes, sir.

Q. When did you come to Oregon? [60]

A. 1932.

Q. Just before coming to Oregon did you have any experience with a firm of public accountants?

A. I did.

Q. What was the firm?

A. Spradling, Carter & Jordan.

Q. Where were they located?

A. Indianapolis.

Q. On coming to Oregon what did you do when you first got here?

A. I worked on a ranch in Eastern Oregon.

Q. What year did you come to Portland?

A. 1933, in the fall.

(Testimony of G. L. Crowe.)

Q. Did you work for a firm of public accountants here? A. I did.

Q. Who? A. Price, Waterhouse.

Q. When did you work for them?

A. I started work for them in January, 1934.

Q. And did you work for another firm the same year? A. Yes, sir.

Q. Who were they?

A. Lybrand, Ross Brothers & Montgomery.

Q. And from there where did you go?

A. To Balfour, Guthrie & Company. [61]

Q. And when did you go to work for Balfour, Guthrie & Company? A. In August, 1934.

Q. And how long did you continue in the employ of Balfour, Guthrie & Company?

A. Until May, 1939.

Q. How old were you when you went to work for Balfour, Guthrie? A. Thirty-four.

Mr. Jones: I wish that the witness would be handed Pre-Trial Exhibit No. 1—or it is now Exhibit No. 1. I think that has been received in evidence.

Q. I would like to have you take those checks out and examine the face to see who signed them and the back to see who endorsed them. Let me interrupt. If you see any that are signed except by Mr. Lawson or Mr. Chrystall lay them aside as you go through.

(The witness examined the exhibit.)

(Testimony of G. L. Crowe.)

Q. Who had those checks prepared, do you know?

A. They were prepared under my direction.

Q. By some girl in the office? A. Yes.

Q. And after they were prepared who took them to the persons who signed them? A. I did.

Q. Who endorsed the payee's name on the back of those checks? A. I did. [62]

Mr. Jones: Now I want the witness to have Pre-Trial Exhibit No. 2.

Q. I want to direct your attention on Exhibit No. 2 to the carbon copies—or what is Exhibit No. 2?

A. These are carbon copies of checks.

Q. Prepared under whose direction?

A. Under my direction.

Q. I want to direct your attention to checks numbered 4016, 4004, 4003, 3965, 3762, 3761, 3760, 3499, 3496, and 3483. Now in the "B" series, 15920, 15566—that is the missing one. There is no carbon there for 15566. 15367, 15340. Do you find it?

A. No, not yet.

Q. 15340? A. Yes.

Q. All right, now, in the "A" series, 10622?

A. Yes.

Q. 10346? A. Yes.

Q. 10323? A. Yes.

Q. 10292? A. Yes.

Q. 10230? A. I don't see it here. [63]

Q. Do you find 10230 or 10229?

(Testimony of G. L. Crowe.)

A. No, it isn't here.

Q. Now along with that group of checks, all of which you have found so far except two—along with that group of checks do you find the carbon copies of other checks made to the same payee?

A. Yes.

Q. The other checks, the checks last mentioned, were those checks actually turned over to the payee named in them? A. No, sir.

Q. Now, the checks that I am last talking about. The ones that we first read, they weren't turned over to the payee, you say? A. No, sir.

Q. Now where there are duplicate checks there, or checks to the same persons, or drafts for the same amount, were they turned over to the payee?

A. They were, yes, sir.

Q. So the checks that we have just been reading the numbers on, as far as you have found them were checks that were prepared under your direction? A. They were.

Q. And you had the officer sign them?

A. Yes, sir.

Q. And who endorsed the payee's name on those checks? [64] A. I did.

Q. Do you know what became of the originals?

A. Yes, sir.

Q. What? A. I destroyed them.

Q. This check B-15566 and this A-10230, did you also have those checks prepared?

A. Yes, sir.

(Testimony of G. L. Crowe.)

Q. And have you made some check and investigation to know whether you are the one that put your name on those checks? A. Yes, sir.

Q. I mean endorse the payee's name on those checks. You endorsed the payee's name on those?

A. I did.

Q. And so although you can't find any evidence of those, even in the copies and the other records, the books and payrolls, are you able to identify checks B-15566 and A-12030 as checks that you had prepared and on whose back you endorsed the payee's name? A. Yes, sir.

Q. Did you ever have authority from those payees to endorse their names on them?

A. No, sir.

Q. Do you know whether the payees or any of them knew that you were endorsing their names on them? [65] A. No.

Q. Why did you write the names on there?

A. To get that money for myself.

Q. Did you keep it yourself? A. I did.

Q. Use it yourself? A. Yes, sir.

Q. No part of it was ever turned over to the payees? A. No.

Q. When you took those checks in to the various officers to sign the checks what representations did you make to them?

A. I represented these checks as being checks due the payee and supported that with the payroll for the officer to sign the check.

(Testimony of G. L. Crowe.)

Q. And did you take the payrolls with you?

A. Yes, sir.

Q. Did you ever at any time tell the payees of any of those 126 checks with which we are concerned here about them? Did they ever have any knowledge of those checks from you?

A. No, sir.

Q. Were any of the amounts of those checks due you from the Interior Warehouse Company?

A. No, sir.

Q. If there are any fictitious persons to whom you made any of those checks did you inform the Interior Warehouse Company of [66] that fact?

A. No, sir.

Q. Who wrote their names on those checks as signing for the makers on those that you laid out?

A. Do you mean except for Mr. Lawson and Mr. Chrystall?

Q. Yes, who were those men?

A. They were signed by John Dickson and D. W. L. MacGregor.

Q. Were those handled by you in just the same manner as the ones that Lawson and Chrystall signed? A. Yes, sir.

Mr. Jones: I want to have the witness see Exhibit No. 4.

Q. Is Exhibit No. 4 in your handwriting?

A. Yes, sir.

Q. Is it signed by you? A. Yes, sir.

Q. Does that refresh your memory on the facts there stated? A. Yes.

(Testimony of G. L. Crowe.)

Q. Were there any persons named in any of these checks who were non-existent, who were fictitious people?

A. They were as far as I was concerned.

Q. Who were they?

A. Shall I read them off to you?

Q. Yes.

A. C. Clarkson, C. Warren, C. W. Clark, L. G. Cross, A. R. Reed.

Q. The rest of the checks were made to people who were actually [67] in existence, living people, but who had nothing coming to them—is that right—as far as those checks were concerned?

A. That is right.

Mr. Jones: Now at this time, if the Court please, I wish to offer in evidence Pre-Trial Exhibits 1-A and 1-B in lieu of Pre-Trial Exhibit No. 1, the original checks, with the understanding that the original checks, Exhibit No. 1, may remain with the court until the case is decided, but thereafter we would like 1-A and 1-B to stand in lieu of them and the originals to be returned to the plaintiffs or to whoever is entitled to them.

The Court: Yes.

(The photostatic copies of checks heretofore marked Plaintiffs' Pre-Trial Exhibits 1-A and 1-B, respectively, were thereupon received in evidence.)

Mr. Jones: We would like to offer at this time Pre-Trial Exhibit No. 2. That is the carbon copies

(Testimony of G. L. Crowe.)

of the 19 missing checks except the two that I mentioned which the records have been completely destroyed on, and attached to it are the carbon copies of other checks which were made for the same amounts or similar amounts or had the amounts included in them and went to the people that they were due to, and the 19 checks listed at the bottom of Page 6 of the pre-trial order are the duplicates that were made by this man for his own benefit. [68]

Mr. Wood: That exhibit is objected to, your Honor, on the ground that it is incompetent, immaterial, and irrelevant. They couldn't make the tender that the law requires of the original checks—they don't claim they ever did. They can't present them to the Court to sell them to us in case we lose the lawsuit and have to pay the judgment. They can't show who the prior endorsers are or produce the paper itself. This question goes to the proposition of whether or not our legal rights are being impaired by their failure to produce the original paper which they have to produce and give to us in case we buy it.

The Court: Well, the very distinction that you are calling attention to entitles these to admission in evidence. As far as their admissibility in evidence, I think they are admissible, and I so rule.

(The carbon copies of checks, heretofore marked Pre-Trial Exhibit No. 2, was thereupon received in evidence.)

PAY ROLL FOR

AMOUNT OF CHECK

Pay-Roll Remittance Voucher

Employee Number 542-01-9877

For earnings to Nov. 30, 1938
Worked Reg. Overtime

Amount Earned \$76.80

Deductions:

State Unemp Tax

Fed Old-Age Tax

Group Ins

Advance

.77

Total Deductions

76.03

Net Amount Paid

DETACH AND RETAIN THE VOUCHER
Interior Warehouse Company

Dec. 2nd, 1938

Nº 4004

76.03

LD THORPE

(Testimony of G. L. Crowe.)

Mr. Jones: At this time we also are offering in evidence the Price, Waterhouse report, Pre-Trial Exhibit No. 3. I have some cases on the admissibility of that; I am not going to take the Court's time to refer to them.

The Court: Is that the audit?

Mr. Jones: That is the audit.

The Court: The audit as a whole is rejected. [69]

Mr. Jones: What is that?

The Court: The audit as a whole is rejected. If the offer is in that form it is rejected.

Mr. Jones: I want to again read what they have admitted about its authenticity, and so forth: "Audit of Price, Waterhouse & Company admitted by the defendant to be the original of such audit without further identification, subject, however, to any and all legal objections to any statement, matter, or thing therein contained where the same is or are not supported at the trial by bank statements, original documents, or legally admissible testimony to be produced or supplied by the plaintiffs." Now in support of our feeling that this is admissible I want to call the Court's attention to the fact that Mr. Rawlinson had stated that to his best understanding—or words to that effect—all of the supporting evidence for the audit is found in that group of exhibits over there. He had been here personally when the 19 checks, the originals of which have been destroyed, were collected, and that

(Testimony of G. L. Crowe.)

the audit could have been produced without the testimony of Mr. Crowe and facts were available for them at the time out of which they could have compiled it on the face of their record.

(The matter was thereupon argued to the Court.)

The Court: The objection to the exhibit as a whole must be sustained. For instance, this isn't a true audit like the one that you were talking about. It apparently requires a [70] lot of strenuous explanations by the accountant on matters which I am quite sure are based on hearsay or that he doesn't know anything about. We heard his testimony on the stand this morning. There are statements like this appearing in the introduction: "Following the acknowledgment made to us by Mr. G. L. Crowe that there were irregularities in the accounts kept by him", and so forth. That statement is purely hearsay. I don't think that it would do any harm. On page 3, the second whole paragraph: "During the course of our examination and in the presence of our representatives, all of the checks enumerated on Schedules 1 to 6 were listed by Mr. G. L. Crowe in his handwriting with appropriate notations regarding the conversion to his own use of the proceeds." You have the witness here. Why don't you have him testify to these things that you want? The audit as a whole is not admissible on

(Testimony of G. L. Crowe.)

that account. Now as far as the tabulations are concerned I think that they are properly admissible, but in the statement of funds withdrawn which appears on Exhibit A, covering improper disbursements, I think Schedule 1 probably is objectionable.

Mr. Jaureguy: I didn't get which one that was, your Honor.

The Court: I say, on Schedule 1. I take it as a part of Exhibit A, though I am not sure; it is the next page, anyhow. It says, "Schedule 1." Apparently that notation isn't objectionable because it shows what the auditors were doing. That applies [71] also to the other two remarks on that page. Apparently those are all right. Then on Schedule 2, "The endorsements on the checks listed do not correspond with the signatures of the employees." The accountant this morning testified he wasn't a handwriting expert. Unless you are going to prove that those are different the Court **from inspection** can make up its mind as well as the witness whether they are similar. That same remark applies also in Schedule 3, also on Schedule 4, and on Schedule 5, "List of amounts charged by the bank on the company's bank statements showing payments where paid checks as evidence thereof are not available, possibly destroyed." I think that is a conclusion that the Court might draw. I don't think the witness has any right to draw it or that it can be included properly in this.

(Testimony of G. L. Crowe.)

Likewise the notation as to the check at the bottom of the page, May blank, 1936, A-10230. In Schedule 6 the same statement which the Court previously referred to again appears in parentheses. I am not quite sure but what the main heading is hearsay and I am not positive if there is any basis for the notation appearing at the bottom of Schedule 6. I don't think Exhibit B is admissible if it isn't the work of the auditor, if he is relying on something else; "Copy of lists of checks and notations as prepared by Mr. G. L. Crowe in presence of a representative of Price, Waterhouse & Company." If Mr. Crowe is going to do that you had better do it on the stand on cross examination, [72] and so I sustain the objection to the document as a whole. I think that has no bearing whatsoever on the authorities that you have read. I think that there are computations possibly that can be introduced either in this form or another, but I think that the basis which is being used by these auditors has no basis in evidence. They are trying to prove something, and they have drawn conclusions which as the trier of facts in this case I am going to draw.

Mr. Jones: Well, if the Court please, I will go ahead with the rest of my exhibits and then by that time it will be about recess time, I hope, and then I would like for just a minute to go through it more carefully for the purpose of additional testimony on those points.

(Testimony of G. L. Crowe.)

The Court: Yes.

Mr. Jones: With respect to Exhibit 7, which is a policy of the American Surety Company, it is admitted by the defendant to be the original without further identification. They have reserved an exception to the materiality, and I would like to offer the American Surety Company's policy at this time.

Mr. Wood: We have no objection.

The Court: Admitted.

(The policy of the American Surety Company, heretofore marked Plaintiffs' Pre-Trial Exhibit No. 7, was thereupon received in evidence.)

PLAINTIFFS' EXHIBIT No. 7

AMERICAN SURETY COMPANY

of New York

Organized 1884

Company's Home Office Building

100 Broadway, New York

The American Surety Company of New York (hereinafter called the Surety), in consideration of an agreed premium, binds itself to pay to Balfour, Guthrie & Co. Ltd. and/or Crown Mills and/or Interior Warehouse Company hereinafter called the Employer), within sixty (60) days after satisfactory proof thereof, such pecuniary loss as the Em-

(Testimony of G. L. Crowe.)

ployer shall have sustained of money or other personal property (including money or other personal property for which the Employer is responsible) through the fraud, dishonesty, forgery, theft, embezzlement, wrongful abstraction or wilful misapplication committed directly or in connivance with others by any employee or employees named upon the schedule attached hereto and made a part hereof, in any position, anywhere, during the period commencing with the respective dates set opposite the name of the employee or employees in such schedule, and ending with the termination of the suretyship for any employee by his dismissal or retirement from the service of the Employer, by the discovery of loss hereunder, or by cancellation by the Employer or the Surety.

Provided, that if at the time of the issuance of this bond, one employee only is designated on said schedule, it is understood and agreed, notwithstanding anything contained herein to the contrary, that coverage is afforded in respect to such named employee, only, and that it will not be permissible to include or add hereto at any future period the name of any other employee.

The liability of the Surety on account of any one employee shall not exceed the amount set opposite the employee's name in said schedule. The Employer may, during the continuance of this bond, add other employees to said schedule or increase

(Testimony of G. L. Crowe.)

or decrease the amount of suretyship for any employee, by giving written notice to the Surety, but such notice shall not be binding on the Surety until the Employer has received the Surety's written acceptance thereof. In the event of such increase or decrease, the Surety's liability as respects such employee shall not exceed the scheduled amount in effect as to such employee when the dishonest act of the employee shall have been committed. The Surety's liability shall in no event exceed the maximum amount at any time in effect in said schedule as to such employee.

Upon the discovery by the Employer of any dishonest act on the part of any employee the Employer shall give immediate written notice thereof to the Surety at its Home Office. Affirmative proof of loss under oath, together with full particulars of such loss, shall be filed with the Surety at its Home Office within three (3) months after such discovery.

Any claim hereunder must be duly made upon the Surety within fifteen (15) months after the termination of the suretyship for the defaulting employee, and no suit, action or proceeding shall be brought hereunder by the Employer against the Surety after the expiration of twelve (12) months after the filing of proof of loss as above required, or, in case such limitation be void under the law of the place governing the construction hereon then

(Testimony of G. L. Crowe.)

within the shortest period of limitation permitted by such law.

The suretyship for any or all employees may be cancelled:

(a) By the Surety, by giving thirty days' notice of cancellation to the Employer in writing of its desire to so cancel;

(b) By the Employer, by giving notice to the Surety in writing of the Employer's desire so to cancel.

In the event of such cancellation and no claim having been made hereunder the Surety shall refund the unearned premium, if any.

It is understood and agreed that the Employer may add new or additional employees other than those appearing on the schedule. Each new employee shall be automatically added to the schedule beginning with the date of his employment in the amount of One Thousand and 00/100 (\$1,000.00) Dollars, except that the liability of the Surety as to any such new employee shall terminate at the expiration of sixty (60) days from the date his employment begins, unless prior thereto the Employer shall notify the Surety and the Surety shall give its written acceptance of such liability.

In witness whereof, the American Surety Company of New York has caused this bond to be signed

(Testimony of G. L. Crowe.)

by its duly authorized officers and its corporate seal to be hereunto affixed this 1st day of July, 1932.

AMERICAN SURETY

COMPANY OF NEW YORK,

By (sgd.) C. S. FILLER,

Resident Vice President.

Attest: (sgd.) W. A. KING,

Resident Asst. Secretary.

(sgd.) C. S. FILLER,

Resident Agent.

AMERICAN SURETY COMPANY

of New York

Organized 1884

Company's Home Office Building

100 Broadway, New York

RIDER

Whereas certain fidelity suretyship with the American Surety Company of New York as Surety to Balfour, Guthrie & Co., and/or Crown Mills and/or Goldenrod Milling Company and/or Interior Warehouse Company, as their interests may appear, Portland, Oregon, as Employer, to-wit:

Fidelity Schedule Bond #13341, dated July 1st, 1924

is superseded by this rider and Fidelity Schedule Bond executed July 1st, 1932 by said Surety to said Employer.

Now, therefore, in consideration of the premises, and premium to be paid to the Surety, it is understood and agreed by the Surety and Employer:

(Testimony of G. L. Crowe.)

(a) That said superseded suretyship is terminated on the issuance of this rider and superseding fidelity schedule bond attached;

(b) That as long as the right exists under the terminated suretyship for any employe, to make claim against the Surety, or to proceed on such claim, the liability of the Surety for loss claimed and recoverable under said terminated suretyship and for loss occurring under the attached fidelity schedule bond shall not in the aggregate exceed the larger or largest amount for which the Surety has become liable for such employe under said terminated suretyship and the attached fidelity schedule bond;

(c) That if loss which would have been recoverable under the superseded suretyship for any employe had it not been terminated shall be discovered after the right to make claim thereunder has expired, and if such loss be of a kind that would be recoverable under the attached fidelity schedule bond had it occurred during the currency thereof, such loss, and any and all loss caused by such employe and occurring after the effective date of the attached fidelity schedule bond and recoverable thereunder, but not in the aggregate exceeding the amount for which the Surety has become liable for such employe under the attached fidelity schedule bond on the date hereof, may be recovered by the Employer if claim be duly made upon the surety

(Testimony of G. L. Crowe.)

within the time and in the manner required by the attached fidelity schedule bond for recovery of loss thereunder.

In Witness whereof the Surety has set its hand and seal this 1st day of July, 1932.

AMERICAN SURETY
COMPANY OF NEW YORK,

By (sgd.): C. S. FILLER,
Resident Vice President.

Attest: (sgd.) W. A. KING,
Resident Asst. Secretary.

Accepted:

BALFOUR, GUTHRIE & CO., LIMITED.

By: (sgd.) J. A. DICK.

NOTICE OF ACCEPTANCE

American Surety Company of New York
Company's Office Building
100 Broadway, N. Y.

Branch office at Portland, Oregon. Date July 1st, 1934.

Balfour, Guthrie & Co. Ltd. and/or Crown Mills and/or Interior Warehouse Company, Portland, Oregon.

In consideration of an annual premium and subject to the terms of this Company's Schedule Fidelity Bond issued to you, the liability of this Company thereunder, as Surety for the following named em-

(Testimony of G. L. Crowe.)

ployes, is specified as being in the amount and from the date set opposite the names of such employes, respectively. It is understood that the liability is not cumulative and that the American Surety Company of New York does not assume liability during any year or years or for any default or defaults in the aggregate exceeding the amount of its suretyship as determined by the original obligation of suretyship.

AMERICAN SURETY
COMPANY OF NEW YORK,
By W. A. KING,
Resident Vice President.

#599759-D

Resident Assistant Secretary.

[Endorsed]: Filed Mar. 29, 1941.

Mr. Jones: Now then, 4, 5, and 6 will not be important [73] exhibits as long as we were able to locate and get Mr. Crowe here. Does your Honor care to keep this number system, or do you number them chronologically?

The Court: No, I want the numbers at the trial to correspond with the numbers of the pre-trial exhibits, so that anyone going over the record afterwards can see just which ones are admitted and which ones are excluded.

Mr. Jones: The next exhibit that we have will

(Testimony of G. L. Crowe.)

be Pre-Trial Exhibit No. 8, which is a Lloyd's policy, and I think with the same admission by the defendant and subject to the same reserved objection.

Mr. Wood: There is no objection.

The Court: Admitted.

(The policy of Lloyd's, London, heretofore marked Plaintiffs' Pre-Trial Exhibit No. 8, was thereupon received in evidence.)

PLAINTIFF'S EXHIBIT No. 8

(Stamped): 2194 * 30 Jun 1938

529

G

Form J (a)

No. N 36882.

LLOYD'S, LONDON.

D. C.

Balfour Guthrie and Co. etal.

\$25,000 @.....% \$320.00

Policy and Stamp .25

158. \$320.25

Date of Expiry: 1st April, 1939.

The Assured is requested to read this Policy, and, if incorrect, return it immediately for alteration.

In the event of any occurrence likely to result in

(Testimony of G. L. Crowe.)

a claim under this Policy, immediate notice should be given to: Lewis & Cartwright, Inc., Insurance, Surety Bonds, Lewis Building, Atwater 5053, Portland, Ore.

No Policy or other Contract dated on or after 1st Jan., 1924, will be recognized by the Committee of Lloyd's, as entitling the holder to the benefit of the Funds and/or Guarantees lodged by the Underwriters of the Policy or Contract as security for their liabilities unless it bears at foot the Seal of Lloyd's Policy Signing Office.

J (a)

Form approved by Lloyd's Underwriters' Fire and Non-Marine Association.

LLOYD'S POLICY.

(Subscribed only by Underwriting Members of Lloyd's who have complied in all respects with the requirements of the Assurance Companies Act of 1909 as to security and otherwise.)

(Seal.)

Any person not an Underwriting Member of Lloyd's subscribing this Policy, or any person uttering the same if so subscribed, will be liable to be proceeded against under Lloyd's Acts.

\$25,000.

N 36882.

Printed at Lloyd's, London, England.

Whereas Balfour Guthrie and Company Limited &/or Crown Mills &/or Coos Feed and Seed Stores

(Testimony of G. L. Crowe.)

&/or Interior Warehouse Company &/or all their affiliated, Proprietary, Parent or Subsidiary Corporations or Partnerships.—of—(hereinafter called “the Assured”), have paid \$320.00 (being 100% of Underlying Premium) Premium or Consideration to Us, who have hereunto subscribed our names to Insure against Loss as follows:—as per Wording attached hereto:—

Attaching to and Forming Part of Lloyd’s Policy No. N. 36882 Effected With Lloyd’s Underwriters.

1. This policy is for an amount of \$25,000 applying to each and every and all employees or persons bonded primarily as hereinafter described in a Bonding Company, the intent and meaning being that under this Policy the Underwriters shall not be liable for a sum of more than \$25,000 in the aggregate in respect of any or all losses.

2. This Policy is to indemnify the Assured for any loss they may sustain by reason of infidelity or dishonesty of any or all of their employees, or from any other cause stated in the Primary Policy and covered thereunder. This Policy is subject to all the same terms and conditions as the Primary Bond and/or Bonds in the Bonding Company of which this Policy pays the excess in so far as the terms and conditions of the Primary Bond and/or Bonds do not conflict with the following specific conditions of this policy.

(Testimony of G. L. Crowe.)

Conditions.

3. (a) It is a condition of this Policy that all employees or persons covered hereby shall be bonded in a Bonding Company and it is further understood and agreed that the Underwriters hereon shall be liable only for the losses in respect of any employee and/or person so bonded when the loss exceeds the amount for which such employee or persons is bonded in the Bonding Company and then only for the loss in excess of such Primary Bond.
- (b) It is a condition of this Policy that no employee or person covered hereunder shall be bonded in a Bonding Company for a sum of less than \$1,000.
- (c) Warranted free from all claims for losses not discovered within the period of this Policy, and for losses sustained prior to the 1st day of July, 1930, but with the understanding that in the event of non-renewal the Assured shall have the same period of time as provided in the discovery clause in the primary bond following the expiry date of this Policy in which to discover losses which may have occurred between the day named in this warranty and the expiry date of this Policy provided always that such discov-

(Testimony of G. L. Crowe.)

ery period shall not exceed three years from the expiry date hereof.

Definition

The term "Bonding Company" as used herein shall be understood to mean an American or "Canadian Bonding Company" or other Bonding Company operating in the United States of America and/or Canada.

(4) The premium is based on the understanding that the total number of employees or persons covered at the inception hereof was 128 and that such employees were then bonded as aforesaid for a total sum of \$128,000.

(5) Additions or reductions to staff held covered automatically following the underlying American Surety Company on same terms (other than the excess hereunder) subject to final adjustment of premium on expiry. Such adjustment of premium to be calculated at 100% (One Hundred Per Cent) of the additional or return premium payable in connection with the Primary Bond and/or Bonds.

CANCELLATION CLAUSE.

(Approved by Lloyd's Underwriters' Fire and Non-Marine Association.)

This Policy may be cancelled at any time at the request of the Assured in writing to the Broker who

(Testimony of G. L. Crowe.)

effected the insurance, and the premium hereon shall be adjusted on the basis of the Underwriters receiving or retaining the customary short term premium.

This Policy may also be cancelled by or on behalf of Underwriters by 10 days' notice given in writing to the Assured at his last known address, and the premium hereon shall be adjusted on the basis of the Underwriters receiving or retaining pro rata premium.

Notice shall be deemed to be duly received in the course of post if sent by pre-paid letter post properly addressed.

Printed at Lloyd's, London, England. 2/12/35

LIST OF EMPLOYEES

Balfour, Guthrie & Co., Limited
and/or Crown Mills, a Corporation and/or
Interior Warehouse Company and/or
Coos Feed & Seed Stores.

As of April 1, 1938.

BALFOUR, GUTHRIE & CO., LTD.	CROWN MILLS	INTERIOR WAREHOUSE CO.
Atkinson, Robert G. S.	Amer, L. J.	Alexander, F. N.
Andrews, John	Anders, William H.	Bumgarner, Walter C.
Angus, James M.	Baker, Fred E.	Darnielle, Frank A.
Cameron, D. S.	Baracco, Peter	Elledge, Chas. C.
Campbell, John	Baracco, T.	Foster, Guy C.
Chrystell, Andrew M.	Beauvais, Alexander J.	Franklin, R. B.
Cormack, James	Brock, H. A.	Frischknecht, John A.
Crowe, G. L.	Brophy, James P.	Green, Cornett

(Testimony of G. L. Crowe.)

BALFOUR, GUTHRIE
& CO., LTD.

CROWN
MILLS

INTERIOR
WAREHOUSE CO.

Dick, James A.
Dickson, Marguerite
Dickson, Rachel.
Dillon, Louis M.
Dwyer, Emily
*Ehelebe, Wm. A.
Ellis, William H.
*Fowler, Roy S.
Garvin, Donald E.
Hanton, John B.
*Harvey, Wm. S.
*Higgins, Joseph O.
Howatt, Arthur U.
Johnson, Florence H.
Johnson, Otto C.
Jones, Albert E.
Laidlaw, Lansing
Lawson, J. B. W.
MacGregor, D. W. L.
Marshall, Donald C.
Martin, George R.
McElvogue, Thos. R.
Mills, Arthur G.
Myers, Robert A.
Pattullo, William N.
Pooley, Bayfield R.
Runciman, A.
Russell, Hugh
Shepherd, Robert F.
Sorensen, Stanley R.
*Steel, Harry B., Jr.
Strang, John B.

Bunsen, Carl F.
Callison, P. G.
Carney, John P.
Clark, George
Clark, Thos. R.
Dear, C. R.
Deibert, Mary E.
Denman, Herbert
Dickson, Arthur John
Dykeman, C. A.
Fawver, Everett M.
Gillespie, Darrell
Griffin, William
Grim, M.
Hall, Claude C.
Hanson, Clyde
Haskins, Frank B.
Jensen, George V.
Kisky, Christian
Laasch, Ernest G.
Lamb, C. C.
Larsh, Frank B.
Mack, William M.
Mathies, Alfred G.
Mattice, W. A.
Metler, Wm. K.
Miller, Ray P.
Mills, James H.
Nebergall, Harry L.
O'Connor, John R.
Pallant, A. G.
*Smith, Dan O.
Snipes, Edward C.
Snipes, Joseph E.

*Griffith, Elmer
Hatcher, Frank
Henning, Paulski
Imlay, James W.
Irving, L. H.
Lindsay, D. D.
Marvel, Arthur A.
McKean, Robert H.
Miller, George P.
*Morgan, Raleigh
Rodman, Fred L.
Rumohr, Louise
Star, C. L.
Sutherland, William
*Shields, Fred A.
Todd, James P.

--
COOS FEED &
SEED STORES

Barklow, Dan, Jr.
Barklow, Leslie V.
*Gillespie, Agnes I.
Gillespie, James D.
Griffin, Rural
Hufford, E. D.
Kollar, Dewey S.
Lucas, Harry
*Mills, Allen T.
Ward, Spencer

(Testimony of G. L. Crowe.)

BALFOUR, GUTHRIE & CO., LTD.	CROWN MILLS
Vosper, C. V.	Stephens, C. E.
Walker, Kathleen E.	Stockdale, Ziba L.
Wood, Edgar F.	Strang, Robert B.
*Woodruff, Jas. R.	Thomas, Ralph
	Walker, George
	Walker, Theodore D.
	White, William L.
	Worden, Homer

(*)New employees taken on during year 1937 and still on as of 4/1/38

	Balfour Guthrie	44
TOTAL —	Crown Mills	50
	Interior Warehouse	24
	Coos Feed & Seed	10

128

BALFOUR GUTHRIE & CO., LTD., ET AL.

Excess Fidelity Bond N-23473

LIST OF EMPLOYEES PUT ON OR TAKEN OFF DURING THE
POLICY YEAR APRIL 1, 1937 TO APRIL 1, 1938

<u>Put on:</u>		<u>Date</u>	<u>Pro Rata Additional Premium</u>
Gillespie, Agnes I.	(Coos Feed & Seed)	April 1, 1937	\$2.50
Griffith, Elmer	(Interior Whse)	“	2.50
Stewart, Bradley	“ “	“	2.50
Fowler, Roy S.	(Balfour Guthrie)	July 31, 1937	1.67
Harvey, Wm. S.	“ “	“	1.67
Higgins, Jos. O.	“ “	“	1.67
Steel, Harry B., Jr.	“ “	“	1.67
Ehelebe, Wm. A.	“ “	Aug. 13, 1937	1.59
Morgan, Raleigh	(Interior Whse)	Sep. 10, 1937	1.39
Woodruff, Jas. R.	(Balfour Guthrie)	Oct. 1, 1937	1.25
Mills, Alan T.	(Coos Feed & Seed)	Nov. 1, 1937	1.04
Shields, Fred A.	(Interior Whse)	Feb. 1, 1938	.40
			<hr/> \$19.85

(Testimony of G. L. Crowe.)

Taken off:			Pro Rata Return Premium
Hawkins, Geo.	(Interior Whse)	April 1, 1937	2.50
Gray, Frank	(Balfour Guthrie)	June 1, 1937	1.50 (*)
Laughton, Wm. M.	“ “	“	1.50 (*)
Button, Arthur	“ “	July 1, 1937	1.50 (*)
McKean, J. C.	(Interior Whse)	“	1.50 (*)
MacDonald, Alan C.	(Balfour Guthrie)	Aug. 31, 1937	1.46
Andrus, Helen	(Interior Whse)	Sept. 8, 1937	1.40
Watson, Alex	“ “	Sept. 10, 1937	1.39
Clute, Perry O.	(Crown Mills)	Jan. 1, 1937	.61
Stewart, Bradley	(Interior Whse)	Feb. 1, 1938	.40
Net Additional Premium Due.....			\$ 6.09

(*)Minimum Earned Premium=\$1.00 applying to all employees taken off.

Employees last year.....	125
Taken off during year.....	10
	115
Added on during year.....	12
	127
Added on as of April 1, 1938 (Dan O. Smith)....	1
Employees this year.....	128

It is hereby declared and agreed that the domicile or domiciles of the Company and its affiliated Proprietary parent or subsidiary corporations or partnerships are as follows:

Balfour, Guthrie & Co. Ltd.—733 South West Oak Street, Portland, Oregon.

Crown Mills,—733, South West Oak Street and 1362, North West Front Avenue, Portland.

(Testimony of G. L. Crowe.)

Coos Feed and Seed Stores—320, Front Street, Coquille., Oregon. 700 South Broadway, Marshfield, Oregon. 28, Fifth Street, Myrtle Point, Oregon.

Interior Warehouse Company.—733, South West Oak Street, Portland, Oregon.

during the period commencing with the 1st of April, 1938, and ending with the 1st of April, 1939, both days at Noon.

If the assured shall make any claim knowing the same to be false or fraudulent, as regards amount or otherwise, this Policy shall become void, and all claim thereunder shall be forfeited.

Now know ye, that We the Underwriters do hereby bind Ourselves, each for his own part, and not one for Another, our Heirs, Executors, and Administrators, to pay or make good to the Assured or to the Assured's Executors, Administrators, and Assigns, all such Loss or Damage as aforesaid as may happen to the subject matter of this Insurance, or any part thereof during the continuance of this Policy; not exceeding the Sum of Twenty Five Thousand United States Dollars, such payment to be made within Seven Days after such Loss is proved and that in proportion to the several Sums by each of Us subscribed against our respective Names not exceeding the several Sums aforesaid.

In witness whereof We, Underwriting Members of Lloyd's, have subscribed our Names and Sums of Money by Us insured.

(Testimony of G. L. Crowe.)

Dated in London, the 3rd Day of May, One Thousand Nine Hundred and Thirty Eight.

Portland, Oregon, U. S. A.,
June 19th, 1939.

Please pay all losses for our account to Messrs. Gardner, Mountain & D'Ambrumenil Ltd.

BALFOUR, GUTHRIE & CO.,
LIMITED,

By (Illegible)
Vice-President.

(Stamped): R. B. 655

Claim \$5542.43

Fee 120.00

Settled hereon a claim for Embezzlement by G. L. Crowe of \$5662.43, London 6th July 1939.

GARDNER, MOUNTAIN &
D'AMBRUMENIL LTD.

\$22.65% applying to Renewal N 44987.

(Stamped): Not legible.

Mr. Jones: With respect to Pre-Trial Exhibit No. 9, it is a photostatic copy of another Lloyd's policy, defendant admitting authenticity but reserving the same right to make objection on the ground of materiality.

Mr. Wood: There is no objection.

The Court: Admitted.

(Photostatic copy of Lloyd's policy, heretofore marked Plaintiffs' Pre-Trial Exhibit No. 9, was thereupon received in evidence.) [74]

(Testimony of G. L. Crowe.)

PLAINTIFF'S EXHIBIT No. 9

(Stamped) : 2575 * 27 Jun 1939

529.

Form J (a)

No. N 44987.

LLOYD'S, LONDON

MH.

Balfour Guthrie & Co. Ltd., &/or Crown Mills
Feed and Seed Stores &/or Interior Warehouse Co.,
&/or all their affiliated, Proprietary, Parent or Sub-
sidiary Corporations or Partnerships.

\$25,000 @ % \$312.50

Policy and Stamp .25

	351.	\$312.75
		\$312.75

Date of Expiry 1st April, 1940.

The Assured is requested to read this Policy, and,
if incorrect, return it immediattely for alteration.

In the event of any occurrence likely to result in
a claim under this Policy, immediate notice should
be given to:—Lewis & Cartwright Inc.

Issued in an unauthorized company by Durham
& Bates Oregon Surplus Line License No. 6.

No Policy or other Contract dated on or after 1st
Jan., 1924, will be recognized by the Committee of
Lloyd's as entitling the holder to the benefit of the
Funds and/or Guarantees lodged by the Under-
writers of the Policy or Contract as security for
their liabilities unless it bears at foot the Seal of
Lloyd's Policy Signing Office.

J (a)

(Testimony of G. L. Crowe.)

Form approved by Lloyd's Underwriters' Fire and Non-Marine Association.

Any person not an Underwriting Member of Lloyd's subscribing this Policy, or any person uttering the same if so subscribed, will be liable to be proceeded against under Lloyd's Acts.

\$25,000.

Printed at Lloyd's, London, England.

No. 44987.

LLOYD'S POLICY.

(Subscribed only by Underwriting Members of Lloyd's who have complied in all respects with the requirements of the Assurance Companies Act of 1909 as to security and otherwise.)

Whereas Balfour Guthrie and Company Limited &/or Crown Mills &/or Coos Feed and Seed Stores &/or Interior Warehouse Company &/or all their affiliated, Proprietary, Parent or Subsidiary Corporations, or Partnerships.—of—(hereinafter called "the Assured"), have paid \$312.50 (being 100% of Underlying Premium). Premium or Consideration to Us, who have hereunto subscribed our Names Insure against Loss as follows:—as per Wording attached hereto—Attaching to and Forming Part of Lloyd's Policy No. N. 44987. Effected With
Lloyd's Underwriters.

1. This Policy is for an amount of \$25,000 applying to each and every and all employees or persons bonded primarily as hereinafter described in a

(Testimony of G. L. Crowe.)

Bonding Company, the intent and meaning being that under this Policy the Underwriters shall not be liable for a sum of more than \$25,000 in the aggregate in respect of any or all losses.

2. This Policy is to indemnify the Assured for any loss they may sustain by reason of infidelity or dishonesty of any or all of their employees, or from any other cause, stated in the Primary Policy and covered thereunder. This Policy is subject to all the same terms and conditions as the Primary Bond &/or Bonds in the Bonding Company of which this Policy pays the excess in so far as the terms and conditions of the Primary Bond &/or Bonds do not conflict with the following specific conditions of this Policy.

Conditions.

3. (a) It is a condition of this Policy that all employees or persons covered hereby shall be bonded in a Bonding Company and it is further understood and agreed that the Underwriters hereon shall be liable only for the losses in respect of any employee &/or person so bonded when the loss exceeds the amount for which such employee or persons is bonded in the Bonding Company and then only for the loss in excess of such Primary Bond.
- (b) It is a condition of this Policy that no employee or person covered hereunder

(Testimony of G. L. Crowe.)

shall be bonded in a Bonding Company for a sum of less than \$1,000.

- (c) Warranted free from all claims for losses not discovered within the period of this Policy, and for losses sustained prior to the 1st day of July, 1930, but with the understanding that in the event of non-renewal the Assured shall have the same period of time as provided in the discovery clause in the primary bond following the expiry date of this Policy in which to discover losses which may have occurred between the day named in this warranty and the expiry date of this Policy provided always that such discovery period shall not exceed three years from the expiry date hereof.

Definition.

The term "Bonding Company" as used herein shall be understood to mean an American or "Canadian Bonding Company" or other Bonding Company operating in the United States of America &/or Canada.

4. The premium is based on the understanding that the total number of employees or persons covered at the inception hereof was 125 and that such employees were then bonded as aforesaid for a total sum of \$125,000.

5. Additions or reductions to staff held covered automatically following the underlying American

(Testimony of G. L. Crowe.)

Surety Company on same terms (other than the excess hereunder) subject to final adjustment of premium on expiry. Such adjustment of premium to be calculated at 100% (One Hundred Per Cent) of the additional or return premium payable in connection with the Primary Bond &/or Bonds.

LIST OF EMPLOYEES TO BE BONDED
AS AT APRIL 1, 1939

BALFOUR, GUTHRIE & CO. LIMITED

No.		No.	
1	William N. Pattullo	102	Arthur G. Mills
2	James M. Angus	116	Florence H. Johnson
4	Andrew M. Chrystall	119	John Andrews
5	James A. Dick	120	John Campbell
7	Louis M. Dillon	121	G. L. Crowe
8	William H. Ellis	122	Rachel Dickson
10	Arthur U. Howatt	123	Emily Dwyer
12	Donald C. Marshall	125	A. Runciman
13	Robert F. Shepherd	145	Arthur J. Dickson
17	Edgar F. Wood	147	Dugald W. L. MacGregor
20	C. V. Vosper	148	John B. W. Lawson
47	George R. Martin	152	John B. Hanton, Jr.
48	Thos. R. McElvogue	153	Donald E. Garvin
51	Stanley R. Sorensen	154	Robert G. S. Atkinson
52	John B. Strang	157	Roy Stanley T. Fowler
57	Hugh Russell	158	William H. Harvey
79	D. S. Cameron	159	Joseph O. Higgins
80	Kathleen E. Walker	161	William A. Ehelebe
83	Lansing Laidlaw	178	John F. Gagan
90	Marguerite Dickson	180	Donald S. Cameron, Jr.
91	Albert E. Jones	181	Peter Morgan Street
98	Bayfield R. Pooley		

(Testimony of G. L. Crowe.)

CROWN MILLS

15	Ralph Thomas	54	William L. White
16	H. A. Brock	55	George V. Jensen
19	Frank B. Larsh	95	Mary E. Deibert
23	James B. Brophy	96	William M. Mack
24	John P. Carney	99	Edward C. Snipes
25	George Clark	100	John R. O'Connor
26	William H. Anders	105	Darrell Gillespie
27	T. Baracco	106	Leslie V. Barklow
28	Carl F. Bunsen	107	James H. Mills
29	Herbert Denman	111	Alfred G. Mathies
30	William Griffin	117	Alexander J. Beauvais
31	Wm. K. Metler	125	L. J. Amer
32	Theodore D. Walker	127	C. A. Dykeman
33	Robert B. Strang	129	A. G. Pallant
34	Ray P. Miller	130	M. Grimm
35	P. G. Callison	134	Fred E. Baker
36	W. A. Mattice	135	Peter Baracco
39	Thomas H. Clark	136	Everett M. Fawver
40	C. C. Lamb	137	Frank B. Haskins
41	Homer Worden	138	C. E. Stephens
42	Claude C. Hall	139	Ziba L. Stockdale
45	Christian Kisky	166	Dan O. Smith
46	Ernest G. Laasch	167	Lloyd B. Smyth
50	Joseph E. Snipes	177	John Baecher
53	George Walker	182	Douglas Lindsay Stewart

Page 2

LIST OF EMPLOYEES TO BE BONDED

AS AT APRIL 1, 1939

INTERIOR WAREHOUSE CO.

58	William Sutherland	88	Robert B. Franklin
60	James W. Imlay	103	Cornett Green
61	James P. Todd	113	L. H. Irving
62	Guy C. Foster	114	Louise Irving
63	Pulaski Henning	140	George P. Miller
64	Frank A. Darnielle	155	Elmer Griffith
67	Chas. C. Elledge	164	Alan T. Mills
69	Walter C. Bumgarner	170	Albert Fox
72	F. N. Alexander	171	James Leroy Lamb
73	Frank Hatcher	172	Alta B. Snider
81	Arthur A. Marvel	179	Verne W. Walker
85	Robert H. McKean		

(Testimony of G. L. Crowe.)

COOS FEED & SEED STORES

104	James D. Gillespie	
108	Dewey S. Kollar	
112	Dan Barklow, Jr.	
131	Spencer Ward	
132	E. D. Hufford	
144	Rural L. Griffin	
146	Agnes I. Gillespie	
173	Frank Jameson	
176	Melvin H. Drews	
	Total — Balfour Guthrie & Co.....	43
	Crown Mills	50
	Interior Warehouse Co.....	23
	Coos Feed & Seed Stores.....	9
		125

It is hereby declared and agreed that the domicile or domiciles of the Company and its affiliated Proprietary parent or subsidiary corporations or partnerships are as follows:—

Balfour, Guthrie and Co., Ltd., 733, South West Oak Street, Portland, Oregon.

Crown Mills.,—733, South West Oak Street & 1362, North West Front Avenue, Portland.

Coos Feed and Seed Stores.—320, Front Street, Coquille, Oregon. 700, South Broadway, Marshfield, Oregon. 28, Fifth Street, Myrtle Point, Oregon.

Interior Warehouse Company.—733, South West Oak Street, Portland, Oregon.

during the period commencing with the 1st of April, 1939, and ending with the 1st of April, 1940, both days at noon.

If the Assured shall make any claim knowing the same to be false or fraudulent, as regards amount

(Testimony of G. L. Crowe.)

or otherwise, this Policy shall become void, and all claim thereunder shall be forfeited.

Now Know Ye, that We the Underwriters do hereby bind Ourselves, each for his own part, and not one for Another, our Heirs, Executors, and Administrators, to pay or make good to the Assured or to the Assured's Executors, Administrators, and Assigns, all such Loss or Damage as aforesaid as may happen to the subject matter of this Insurance, or any part thereof during the continuance of this Policy; not exceeding the Sum of

Twenty Five Thousand United States Dollars.

such payment to be made within Seven Days after such loss is proved and that in proportion to the several Sums by each of Us subscribed against our respective Names not exceeding the several Sums aforesaid.

In Witness whereof We, Underwriting Members of Lloyd's, have subscribed our Names and Sums of Money by Us insured.

Dated in London, the 18th Day of May, One Thousand Nine Hundred and Thirty Nine.

CANCELLATION CLAUSE.

(Approved by Lloyd's Underwriters' Fire and Non-Marine Association.)

This Policy may be cancelled at any time at the request of the Assured in writing to the Broker who effected the insurance, and the premium hereon

(Testimony of G. L. Crowe.)

shall be adjusted on the basis of the Underwriters receiving or retaining the customary short term premium.

This Policy may also be cancelled by or on behalf of Underwriters by Ten days' notice given in writing to the Assured at his last known address, and the premium hereon shall be adjusted on the basis of the Underwriters receiving or retaining pro rata premium.

Notice shall be deemed to be duly received in the course of post if sent by pre-paid letter post properly addressed.

Printed at Lloyd's, London, England, 2/12/35.

Mr. Jones: Pre-Trial Exhibit No. 10 is the claim of Balfour, Guthrie & Company against the American Surety Company, with the same admission and the same reservation.

Mr. Wood: I take it that this is offered only to show a claim as made, and not in the nature of the declaration of fraud, and so on.

Mr. Jones: It is for that and the assignment, primarily, at the bottom.

Mr. Wood: To show the fact that the claim was made——

Mr. Jones (Interrupting): That the claim was made, and there is a subrogation assignment on the bottom of the document.

Mr. Wood: But the statements in the claim that there were forgeries, you don't claim that to be substantive evidence?

(Testimony of G. L. Crowe.)

Mr. Jones: Oh, no.

Mr. Wood: No objection to it with that understanding.

Mr. Jones: That was received?

The Court: Yes.

(The form of claim heretofore marked Plaintiffs' Pre-Trial Exhibit No. 10 was thereupon received in evidence.)

Mr. Jones: Pre-Trial Exhibit No. 11 is a carbon copy of a claim of Balfour, Guthrie & Company against Lloyd's, with the same admission and the same reservation.

Mr. Wood: To that there is no objection. [75]

Mr. Jones: And it goes in for the same purpose as the last one.

Mr. Wood: No objection.

The Court: Admitted.

(The claim of Balfour, Guthrie & Company heretofore marked Plaintiffs' Pre-Trial Exhibit No. 11 was thereupon received in evidence.)

Mr. Jones: Pre-Trial Exhibit 12 is the Durham & Bates check for \$5542.43 which was made on behalf of Lloyd's in payment of that amount of their loss, and it had a similar admission with a similar reservation.

Mr. Wood: There is no objection with that understanding.

The Court: Admitted.

(Testimony of G. L. Crowe.)

(Canceled check dated August 3, 1939 of Durham & Bates to Balfour, Guthrie & Co. Ltd. in the amount of \$5542.43, heretofore marked Plaintiffs' Pre-Trial Exhibit No. 12 was thereupon received in evidence.)

Mr. Jones: In making the check they were \$10 short, and Pre-Trial Exhibit No. 13 is a check for the same purpose and it has the same admissions and reservations.

Mr. Wood: With that understanding there is no objection.

The Court: Admitted.

Mr. Jones: What do you mean, "with that understanding"?

Mr. Wood: That you don't claim any substantive statements [76] in there. We admit the check——

Mr. Jones (Interrupting): As evidence of the payment of that amount of money?

Mr. Wood: Yes.

(Canceled check dated August 4, 1939 of Durham & Bates to Balfour, Guthrie & Co. Ltd. in the amount of \$10.00, heretofore marked Plaintiffs' Pre-Trial Exhibit No. 13 was thereupon received in evidence.)

Mr. Jones: Pre-Trial Exhibit No. 13-A, a check from the American Surety Company, was part of the loss, with the same admission and reservation.

Mr. Wood: With that understanding, no objection.

(Testimony of G. L. Crowe.)

The Court: Admitted.

(Canceled check dated June 7, 1939 from American Surety Company of New York to Balfour, Guthrie & Co., Limited in the amount of \$1,000, heretofore marked Plaintiffs' Pre-Trial Exhibit No. 13-A, was thereupon received in evidence.)

Mr. Jones: We are offering in evidence Pre-Trial Exhibit No. 14, which is an assignment of Lloyd's portion of the loss to E. L. McDougal, and it had the same admission and the same reservation.

Mr. Wood: No objection.

The Court: Admitted. [77]

(The assignment, heretofore marked Plaintiffs' Pre-Trial Exhibit No. 14, was thereupon received in evidence.)

PLAINTIFF'S EXHIBIT No. 14

Whereas, Lloyd's of London issued their policy of insurance form J (a) No. N36882, dated May 3, 1938, and prior policies and subsequent policy form J (a) No. N44987 and renewals in effect throughout the term of employment hereinafter mentioned, to Balfour, Guthrie & Co., Limited, et al, including its wholly-owned subsidiary, Interior Warehouse Company, hereinafter called the Employer, for a loss in the sum of Five Thousand Five Hundred Fifty-Two and 43/100ths Dollars (\$5,552.43), being the excess over liability in the sum of One Thousand Dollars (\$1,000.00) carried on the employee hereinafter named by the American Surety

(Testimony of G. L. Crowe.)

Company of New York, London Lloyd's liability being for the excess of loss above said One Thousand Dollars (\$1,000.00) primary liability of the American Surety Company of New York;

Whereas, the following is a detailed statement of said loss resulting from the default of said Garth Lewis Crowe, employee, 3437 S. E. Ankeny, Portland, Oregon, employed as bookkeeper from August 13, 1934, to May 2, 1939, in a net loss of \$6,552.43:

Amount of funds withdrawn covering improper disbursements from the account of Interior Warehouse Company with the Bank of California, N. A., Portland, Oregon, for the period from October 2nd, 1935, to May 2nd, 1939, as shown on page 3 of report thereon, made by Messrs. Price, Waterhouse & Co., public accountants, Portland, Oregon, under date of May 26th, 1939\$6,562.33

Information submitted in support of claim—Report of Messrs. Price, Waterhouse & Co., dated May 26th, 1939

Confession of G. L. Crowe of conversion of funds of Company to his own use, dated May 3rd, 1939, has been delivered to American Surety Company of New York.

(Paid checks, covering funds improperly withdrawn from Company's bank account, showing irregular endorsements, have been delivered to the Portland office of American Surety Company of New York, in accordance with its letter of May 16, 1939)

Total Loss	\$6,562.33
CREDITS (By salary or commission)	
Total credits	9.90
	<hr/>
	\$6,552.43

(Testimony of G. L. Crowe.)

Whereas, Lloyd's of London had paid to the said Balfour, Guthrie & Co., Limited, and its wholly-owned subsidiary, the Interior Warehouse Company, the sum of Five Thousand Five Hundred Fifty-Two and 43/100ths Dollars (\$5,552.43), the net loss resulting to the said Employer between October 2, 1935, and May 2, 1939, said payment being by virtue of said policy of insurance and suretyship contract; and

Whereas, the Employer, Balfour Guthrie & Co., Limited, and the Interior Warehouse Company, has assigned and subrogated to Lloyd's of London Employer's right of action in and to each and every item of said loss by an assignment and subrogation agreement;

Now, in consideration of payment of One Dollar (\$1.00) and other good and valuable consideration, Lloyd's of London hereby assigns by virtue of said assignment and subrogation all of its right, title and interest which it may have by virtue of said payment of said claim to E. L. McDougal, Esq., of Portland, Oregon, for collection, hereby empowering said E. L. McDougal, Esq., to collect with or without action any sum or sums that may be due or owing to the said Lloyd's of London or E. L. McDougal, Esq., by virtue of said premises.

In witness whereof we have hereunto set our

(Testimony of G. L. Crowe.)

hands at London, England, this 25th day of October, 1939.

G. SIMMONS & CO.

Per H. B. DORMAN

L. P. LANGTON & CO.

Per B. B. PRESTON

F. R. BUSSELL & CO.

Per H. B. COX

[Endorsed]: Filed Mar. 29, 1941.

Mr. Jones: Pre-Trial Exhibit No. 15 is a copy of Page 32 of the Balfour, Guthrie cash receipts, with the same admission and reservation.

Mr. Wood: No objection.

The Court: Admitted.

(The copy of page of cash receipts, heretofore marked Plaintiffs' Pre-Trial Exhibit No. 15, was thereupon received in evidence.)

Mr. Jones: Pre-trial Exhibit No. 16 is similar sheet and with the same reservation—not of Sheet 32; it is Sheet 33—the same admission and reservation.

Mr. Wood: No objection.

The Court: Admitted.

(The copy of page of cash receipts, heretofore marked Plaintiffs' Pre-Trial Exhibit No. 16, was thereupon received in evidence.)

Mr. Jones: Pre-Trial Exhibit No. 17 is a copy of a tabulation of receipts of Balfour, Guthrie &

(Testimony of G. L. Crowe.)

Company which shows the receipt of a thousand dollars, and with the same reservation.

Mr. Wood: With the same understanding.

The Court: Admitted. [78]

(The tabulation heretofore marked Plaintiffs' Pre-Trial Exhibit No. 17 was thereupon received in evidence.)

Mr. Jones: Pre-Trial Exhibit No. 18 goes to some evidence on behalf of the plaintiffs in support of their position on the diversity of citizenship, the jurisdiction phase of the case. The pre-trial order says: "Printed document bearing heading 'The Bank of California'", and so forth, "excluding the financial statement therein"—we are claiming nothing under that financial statement; "defendant admitting the authenticity but reserving the right to object on the ground of irrelevancy, incompetency, and immateriality."

Mr. Wood: There is no objection now.

The Court: Admitted.

(The list of officers and financial statement of The Bank of California, dated October 2, 1939, heretofore marked Plaintiffs' Pre-Trial Exhibit No. 18, was thereupon received in evidence.)

Mr. Jones: Now, we also have a stipulation at the top of Page 5 of the pre-trial order to the effect that a certain affidavit by Mr. Munly and an affidavit by myself were admitted as being true—the facts in there as being true. However, the facts

(Testimony of G. L. Crowe.)

therein bear directly on this question of jurisdiction and diversity, and as long as we are reserving the question [79] over to the trial itself I should like to have it made a part of the record by offering them in evidence.

Mr. Wood: There is no objection.

Mr. Jones: May I have the affidavit? I lost out on that once, Judge. They didn't go up one time.

The Bailiff: Do you know the numbers?

Mr. Jones: They are just the affidavits in the file.

The Court: Well, what I was debating in my own mind is whether you would be permitted to argue the case if you put them in that way. Perhaps you had better put in a stipulation.

Mr. Jones: I withdraw the offer for the moment. If I put in my affidavit will you stipulate that I may argue the case?

Mr. Wood: No.

The Court: How is that?

Mr. Jones: He won't permit that.

The Court: I suggest that you stipulate the facts.

Mr. Jones: Let me have the affidavit and I will stipulate the facts. Can we stipulate as to the truth of the facts in that affidavit?

Mr. Wood: Just as facts, without reference to the affidavit.

Mr. Jones: Yes, just as facts.

Mr. Wood: Yes, I will stipulate that the statements in each and both of those affidavits are true.

(Testimony of G. L. Crowe.)

The Court: Read them into the record, not as part of the affidavit, but as statements to which counsel agrees. [80]

Mr. Jones: It is stipulated between counsel in this case that at the time of the institution of this cause and during all the times in the complaint herein specified the Bank of California, National Association, was and continues and since has been a national banking association organized and existing under and by virtue of the national banking laws of the United States of America, with its home office and principal place of business in the City of San Francisco, State of California. During all of said times Article II of the articles of association of the said Bank of California, National Association, provided and still provides as follows: "2nd. The place where its banking house or office shall be located and its operations of discount and deposit carried on and its general business conducted to be the City and County of San Francisco, State of California, with branches at Portland, Multnomah County, Oregon, Seattle, King County, Washington, Tacoma, Pierce County, Washington, and Virginia City, Storey County, Nevada. During all of said times The Bank of California, National Association, has owned and maintained and still owns and maintains a branch at Portland, Multnomah County, State of Oregon, which at all of said times was and still is located in the State of Oregon and transacting business in said state as such

(Testimony of G. L. Crowe.)

branch, and it is further stipulated between counsel for the plaintiffs and the defendant that the defendant became a national banking association prior to the [81] year 1927 by virtue of the laws of Congress then in existence.

The Court: To which counsel agrees?

Mr. Wood: Yes, your Honor.

Mr. Jones: Now, at this time might we have a short recess?

The Court: Court is in recess.

(A recess was then taken, after which proceedings were resumed as follows:)

G. L. CROWE,

resumed the stand as a witness in behalf of the plaintiffs and testified further as follows:

Direct Examination

(Continued)

By Mr. Jones:

Q. Mr. Crowe, the 19 checks that you destroyed were destroyed before the audit, were they not?

A. Yes, sir.

Q. And after they were returned from the bank, and before the audit?

A. That is right.

Q. Did anybody request you to tear them up?

A. No, sir.

Q. That was your own idea?

A. Yes, sir.

(Testimony of G. L. Crowe.)

Mr. Jaureguy: Now, if your Honor please, we re-offer—or rather we now offer in evidence the following portions of Pre-Trial Exhibit 3, all of Pre-Trial Exhibit 3 except the [82] following: On Page 1 the first portion of the second paragraph reading as follows: “Following the acknowledgment made to us by Mr. G. L. Crowe that there were irregularities in the accounts kept by him for Interior Warehouse Company.”

Page 3, the third paragraph starting, “During the course of our examination”, and ending with the figure “\$6,562.33,” the last paragraph of the introductory portion, being at the bottom of Page 3 and the top of Page 4 to be excluded; the “Yours very truly” and signature, however, to be included.

On Exhibit A the notation at the end of the second paragraph, “The endorsements on the checks listed do not correspond with the signatures of the employees.” A similar notation at the end of the third paragraph, and a similar notation at the end of the fourth paragraph.

On Schedule 2—

The Court (Interrupting): I think you have missed one, Mr. Jaureguy.

Mr. Jaureguy: Oh, yes, at the end of the sixth paragraph, a similar notation to be excluded.

Schedule 2, the notation in parentheses following the heading, “The endorsements on the checks listed do not correspond with the signatures of the employees.”

(Testimony of G. L. Crowe.)

The next page, Schedule 3, a similar notation in parentheses at the end of the title.

Schedule 4, a similar notation in parentheses at the [83] end of the title.

Schedule 5, the third line of the title, the words in parentheses, "possibly destroyed", and the notation in parentheses at the end of the tabulation beginning, "The carbon copy of the numbered check", and ending with the words, "Showed the same payee." That is to be excluded.

Schedule 6, the words in parentheses at the end of the title, "The endorsements", and so on in parentheses, excluded. About two-thirds of the way down, in capital letters, the following to be excluded: "Check negotiated in Portland which had been written for services performed at Walla Walla."

All of Exhibit B to be excluded.

Mr. Wood: We renew our objection, your Honor. There are still a lot of matters in there—on the very face of it it says, "Covering improper disbursements", and on the initial page, "improper withdrawals", "improper disbursements", and again at the top of Page 3, the five different methods used by Crowe. There is still a lot of objectionable matter in it, your Honor, tabulations and computations, We renew our objections.

The Court: Well, some of these tabulations certainly are competent to explain records that are in

(Testimony of G. L. Crowe.)

the possession of the Court. I don't want to put the burden on you, Mr. Wood, but how much of that do you think could go in?

Mr. Wood: I rather think on the face, your Honor, in addi- [84] tion to what Mr. Jaureguy said, "covering improper disbursements" should be deleted. "Statement of funds withdrawn from the account with the bank", that would be all right. Then on the first page, a letter addressed to Mr. MacGregor, the word "improper" in the fourth line and the words "as improper disbursements" in the seventh line I would think should come out. The part on Page 2 based on their own investigation seems objectionable.

The Court: Well, there is testimony in the record to show that it could be based entirely on the record.

Mr. Wood: Yes, that is true.

The Court: So in view of that I think that could stand.

Mr. Wood: At the top of Page 3 it seems to me those are conclusions which ordinarily the trier of the fact——

The Court (Interrupting): You mean "Schedule 1" or the other?

Mr. Wood: At the very start of the five methods, and again on that page the next to the last paragraph, "improper disbursements."

The Court: Well, that has all been excluded.

Mr. Wood: Then on "A" reference is made, "covering improper disbursements." The Court it-

(Testimony of G. L. Crowe.)

self thought Schedule 1 objectionable, and 2 and 3.

The Court: Well, that related to specific matters that I called attention to, for instance, that in parentheses which [85] Mr. Jaureguy has now indicated that he would eliminate. How about those starred notations at the bottom of Schedules 3 and 4? As a matter of fact I am not sure I know what that means, the starred notations to the effect that "in these instances cash advances had been made; final settlement for each period being effected by check mailed from Portland." Is that part of the record? Where was that information obtained?

Mr. Jaureguy: I can find out, your Honor. The information contained in those notations was obtained from the records, your Honor.

The Court: With the eliminations that have been made by both sides the document will be admitted.

(The statement of funds withdrawn, heretofore marked Plaintiffs' Pre-Trial Exhibit No. 3, was thereupon received in evidence.)

(Testimony of G. L. Crowe.)

PLAINTIFF'S EXHIBIT 3
Interior Warehouse Company

STATEMENT OF FUNDS WITHDRAWN
FROM THE ACCOUNT WITH THE BANK
OF CALIFORNIA, N. A., PORTLAND, OR-
EGON, FOR THE PERIOD FROM SEP-
TEMBER 1, 1935 TO MAY 2, 1939

PRICE, WATERHOUSE & CO.

American Bank Building
Portland, Oregon

May 26, 1939

Mr. D. W. L. MacGregor, Vice-President,
Balfour, Guthrie & Co., Limited,
733 S. W. Oak Street,
Portland, Oregon.

Dear Sir:

In accordance with your instructions we have made an investigation of the books and accounts of Interior Warehouse Company, a wholly owned subsidiary of Balfour, Guthrie & Co., Limited, for the purpose of determining the amount of certain withdrawals from the Company's account with The Bank of California, N. A., Portland, Oregon, which occurred in the period from September 1, 1935 to May 2, 1939. We have attached, as Exhibit A, a statement of funds withdrawn from the Company's bank account and have submitted on schedules 1 to 6 lists of the individual items covering the various

(Testimony of G. L. Crowe.)

types of disbursements enumerated on Exhibit A. , we inspected the endorsements on the paid checks for the period from September 1, 1935 to May 2, 1939 for the purpose of ascertaining whether any of the endorsements appeared spurious. Where such was the case, we satisfied ourselves by examination of other records that the disbursement was irregular. We also checked the charges on the Company's bank statements for this period for the purpose of determining whether all charges were supported by paid checks in the possession of the Company. Where no paid checks were available, it appeared from the data obtained relative thereto and from the entries made on the books in connection with such disbursements that the transactions were irregular.

Our investigation included an accounting for all checks and drafts paid by the bank for the period from September 1, 1935 to May 2, 1939. Paid checks were traced to the dock payrolls and country agents' reports. Comparisons were made of the original dock payroll reports with the dock office copies of such reports and of the originals of the country agents' payroll reports at the head office (with minor exceptions) with the copies which were obtained from the agents at the various country stations. The country agents' copies of their expense reports were also inspected, where available. The monthly summaries prepared at Portland to

(Testimony of G. L. Crowe.)

record the distribution of the charges to the accounts in the general ledger were reviewed, including the distribution of miscellaneous expenses paid by check. Test checks were made of certain of the records to ascertain whether there were irregularities in the accounts during the year prior to October 2, 1935, the date of the first transaction listed on the attached schedules. Our test check of the recording of miscellaneous cash receipts received from country agents indicated that the amounts shown on the agents' copies of their reports were properly recorded at the head office.

The various classes of transactions are explained in the summary shown on Exhibit A. The methods used in recording the contra entries required to keep the books in balance did not necessarily follow the same grouping. The entries used to cover the irregularities were made in the following manner:

Schedule 1 shows two groups of transactions; (1) the items payable to names appearing on the payroll where the records inspected did not indicate that an authentic employee of the name used had been employed during the period under review, and (2) irregular checks payable to names appearing on the payroll where the records inspected indicated that an authentic employee of the name used had previously been employed.

Based on our investigation, it appears that the funds withdrawn as improper disbursements from the Company's bank account from October 2, 1935

(Testimony of G. L. Crowe.)

to May 2, 1939 amount to \$6,562.33. As previously stated, particulars are shown on Exhibit A and the supporting Schedules 1 to 6.

Yours very truly,

PRICE, WATERHOUSE & CO.

EXHIBIT A

INTERIOR WAREHOUSE COMPANY
STATEMENT OF FUNDS WITHDRAWN COVERING
IMPROPER DISBURSEMENTS FROM THE ACCOUNT
WITH THE BANK OF CALIFORNIA, N. A., PORTLAND,
OREGON, FOR THE PERIOD FROM SEPTEMBER 1,
1935 TO MAY 2, 1939

Checks negotiated in Portland which had been made payable to names inserted on the dock payroll, such names not appearing on the carbon copy of the payroll retained at the dock office where the payroll had been prepared. (Schedule 1)	\$1,245.82
Checks negotiated in Portland which had been written payable to employees listed on the dock payroll, such employees actually having been paid by other checks or in cash. (Schedule 2)	369.59
Checks negotiated in Portland which had been written payable to country employees who were actually paid by other checks drawn in Portland (six exceptions noted). (Schedule 3)	2,478.01
Checks negotiated in Portland which had been written payable to country employees who were actually paid by drafts issued by country agents (two exceptions noted). (Schedule 4)	1,462.15
Amounts charged by the bank on the Company's bank statements showing payments where paid checks as evidence thereof are not available (possibly destroyed) and Company's carbon copies of the numbered checks indicate, (1) that the items were in payment for services which were paid for by other checks or drafts, or (2) that the checks had been voided after their preparation. (Schedule 5)	950.39

(Testimony of G. L. Crowe.)

Checks negotiated in Portland which had been written payable to an employee in reimbursement of a petty cash fund, where employee had actually received reimbursement from another source. (Schedule 6)	48.77
Check negotiated in Portland which had been written for services performed at Walla Walla. (Schedule 6)	7.60
(The address used with the endorsement corresponds with the address on certain checks listed on Schedule 4.)	

Total	\$6,562.33
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Schedule 1.

INTERIOR WAREHOUSE COMPANY

LIST OF CHECKS NEGOTIATED IN PORTLAND WHICH HAD BEEN MADE PAYABLE TO NAMES INSERTED ON THE DOCK PAYROLL, SUCH NAMES NOT APPEARING ON THE CARBON COPY OF THE PAYROLL RETAINED AT THE DOCK OFFICE WHERE THE PAYROLL HAD BEEN PREPARED.

Payable to names appearing on the payroll where the records inspected did not indicate that an authentic employee of the name used had previously been employed:

Date	Check Number	Payee	Amount
Apr. 21, 1939	5117	C. Warren	\$ 41.55
Feb. 24, 1939	4653	C. Clarkson	42.00
Sept. 8, 1938	3536	C. W. Clark	46.78
Sept. 1, 1938	3461	C. W. Clark	42.57
Aug. 26, 1938	3423	C. W. Clark	47.77
Aug. 19, 1938	3383	C. W. Clark	51.97
July 22, 1938	3184	C. W. Clark	34.15
June 30, 1938	3059	C. W. Clark	42.17
June 23, 1938	3039	C. W. Clark	33.24
June 9, 1938	2978	C. W. Clark	33.86
May 27, 1938	2886	C. W. Clark	28.84
May 19, 1938	2877	C. W. Clark	28.81

(Testimony of G. L. Crowe.)

Date of Issue	Check Number	Name of Payee	Amount
May 13, 1938	2852	C. W. Clark	29.70
Apr. 21, 1938	2770	C. W. Calrk	36.66
Apr. 14, 1938	2728	C. W. Clark	49.99
Mar. 25, 1938	2586	L. G. Cross	33.73
Mar. 11, 1938	2473	C. W. Clark	36.33
Feb. 17, 1938	2337	C. W. Clark	36.38
Feb. 10, 1938	2292	C. W. Clark	45.79
Jan. 20, 1938	2125	C. W. Clark	37.97
Jan. 13, 1938	2094	A. R. Reed	31.98
Total.....			<u>\$ 812.24</u>

Payable to names appearing on the payroll where the records inspected indicated that an authentic employee of the name used had previously been employed:

Dec. 23, 1937	1950	C. W. Carey	\$ 35.64
Dec. 16, 1937	1925	C. W. Carey	37.15
Dec. 10, 1937	1871	C. W. Carey	31.60
Dec. 3, 1937	1807	C. W. Carey	41.58
Nov. 18, 1937	1625	C. W. Carey	50.54
Nov. 11, 1937	1532	C. W. Carey	30.79
Nov. 4, 1937	1479	C. W. Carey	33.66
Oct. 28, 1937	1369	C. W. Carey	35.64
Oct. 21, 1937	1344	C. W. Carey	34.38
June 24, 1937	713	B. Stewart	30.94
Nov. 15, 1936	B15889	R. Mcayéal	41.66
Dec. 31, 1935	B15007	J. Moore	30.00
Total.....			<u>\$ 433.58</u>
Total carried to Exhibit A.....			<u><u>\$1,245.82</u></u>

(Testimony of G. L. Crowe.)

Schedule 2

INTERIOR WAREHOUSE COMPANY

LIST OF CHECKS NEGOTIATED IN PORTLAND WHICH
HAD BEEN WRITTEN PAYABLE TO EMPLOYEES
LISTED ON THE DOCK PAYROLL, SUCH EM-
PLOYEES ACTUALLY HAVING BEEN PAID BY
OTHER CHECKS OR CASH

Date	Check Number	Payee	Amount
Jan. 27, 1939	4339	W. B. Farthing	\$ 42.75
Oct. 21, 1938	3698	W. H. Hemming	30.63
July 23, 1937	811	F. Franz (payroll shows name of L. Franz)	15.05
July 23, 1937	792	A. Stoutenburgz (payroll shows name of A. Stoutenburg) (endorse- ments include G. L. Crowe)	40.99
July 1, 1937	723	R. P. Rawls	31.98
May 20, 1937	617	A. Stoutenburg	42.12
Apr. 22, 1937	505	W. H. Hemming	33.62
Oct. 29, 1936	B15857	J. Fenton	24.30
Oct. 22, 1936	B15816	R. McAyeal	52.95
Sept. 17, 1936	B15670	A. Wright	31.20
Sept. 10, 1936	B15620	E. Foss	24.00
Total carried to Exhibit A.....			<u>\$369.59</u>

(Testimony of G. L. Crowe.)

Schedule 3

INTERIOR WAREHOUSE COMPANY

LIST OF CHECKS NEGOTIATED IN PORTLAND WHICH
HAD BEEN WRITTEN PAYABLE TO COUNTRY EM-
PLOYEES WHO WERE ACTUALLY PAID BY OTHER
CHECKS DRAWN IN PORTLAND (WITH SIX EX-
CEPTIONS NOTED)

Date	Check Number	Payee	Amount
Apr. 3, 1939	4996	C. C. Elledge	\$ 99.00
Jan. 6, 1939	4233	W. C. Bumgarner (en- dorsements include G. L. Crowe)	128.70
Jan. 6, 1939	560	W. C. Bumgarner (en- dorsements include G. L. Crowe)	40.11
Nov. 14, 1939	3895	J. A. Frischknecht	49.50
Nov. 1, 1938	3749	Roy Lamb	89.10*
Oct. 15, 1938	3691	J. A. Frischknecht	49.50
Aug. 15, 1938	3373	J. A. Frischknecht	49.50
July 14, 1938	3156	J. A. Frischknecht	49.50
July 5, 1938	3126	F. A. Darnielle	50.00
June 3, 1938	2944	C. C. Elledge	74.25
May 2, 1938	2812	Roy Lamb	84.15*
Feb. 15, 1938	2330	J. A. Frischknecht	49.50
Feb. 2, 1938	2259	C. C. Elledge	74.25
Jan. 15, 1938	2113	J. A. Frischknecht	49.50
Dec. 15, 1937	1909	J. A. Frischknecht	49.50
Dec. 6, 1937	1845	P. Henning	60.00
Nov. 15, 1937	1612	J. A. Frischknecht	49.50
Nov. 1, 1937	1453	C. C. Elledge	74.25
Oct. 4, 1937	1243	Roy Lamb	88.70
Sept. 30, 1937	1255	C. G. Starr	74.25
Sept. 15, 1937	1140	J. A. Frischknecht	49.50
Sept. 3, 1937	1118	C. C. Elledge	74.25
Aug. 14, 1937	942	J. A. Frischknecht	49.50

(Testimony of G. L. Crowe.)

Date	Check Number	Payee	Amount
Aug. 4, 1937	860	C. G. Starr	74.25
July 15, 1937	765	J. A. Frischknecht	49.50
July 2, 1937	742	W. C. Bumgarner	123.75
June 3, 1937	657	Roy Lamb	79.20*
May 4, 1937	575	Roy Lamb	49.20
May 3, 1937	549	C. C. Elledge	74.25
Apr. 1, 1937	429	Roy Lamb	79.20*
Mar. 3, 1937	139	Roy Lamb	79.20*
Feb. 2, 1937	A10753	Roy Lamb	79.20*
Jan. 4, 1937	A10680	J. A. Frischknecht	50.00
Nov. 3, 1936	A10598	P. Henning	60.00
Oct. 15, 1936	A10552	J. A. Frischknecht	50.00
Oct. 3, 1936	A10547	C. C. Elledge	74.25
Sept. 15, 1936	A10479	J. A. Frischknecht	50.00
Total carried to Exhibit A			\$2,478.01

* In these instances cash advances had been made; final settlement for each period being effected by check mailed from Portland.

Schedule 4

INTERIOR WAREHOUSE COMPANY

LIST OF CHECKS NEGOTIATED IN PORTLAND WHICH HAD BEEN WRITTEN PAYABLE TO COUNTRY EMPLOYEES WHO WERE ACTUALLY PAID BY DRAFTS ISSUED BY COUNTRY AGENTS (WITH TWO EXCEPTIONS NOTED)

Date	Check Number	Payee	Amount
Mar. 3, 1939	4726	Dick Sperry	\$ 28.51
Mar. 3, 1939	4725	Henry Robertson	31.68
Mar. 3, 1939	4724	Ed. Thorpe	76.03
Feb. 2, 1939	4409	Ed. Thorpe	79.20
Feb. 2, 1939	4408	Dick Sperry (endorsements include Garth Crowe)	4.75

(Testimony of G. L. Crowe.)

Date	Check Number	Payee	Amount
Jan. 4, 1939	4223	Ed. Thorpe	82.37
Oct. 3, 1938	3650	M. Fennimore	78.41
Sept. 6, 1938	3512	Fred Mutt (endorsements include G. L. Crowe)	56.43
Sept. 6, 1938	3511	C. H. Peters (endorsements include G. L. Crowe)	130.68
Aug. 2, 1938	3266	Kemper Snow (endorsements include G. L. Crowe)	33.66
Aug. 2, 1938	3265	Joe Green (endorsements include G. L. Crowe)	123.75
Aug. 2, 1938	3264	Ed. Thorpe	123.75
June 1, 1938	2920	Roy Lamb	84.15*
Apr. 5, 1938	2701	J. E. Flor	50.23
Apr. 2, 1938	2687	Ed. Thorpe	90.68
Feb. 1, 1938	2240	Robt. Stilson	25.24
Jan. 3, 1938	2035	Roy Lamb	84.15*
Sept. 2, 1937	1064	L. G. Speck	80.19
Aug. 3, 1937	849	M. Fennimore	59.40
Sept. 3, 1936	A10451	E. J. Ricker	70.09
Oct. 2, 1935	A9880	M. N. Mellick	20.00
Oct. 2, 1935	A9879	Ed. Mellick	20.00
Oct. 2, 1935	A9878	N. A. Campbell	28.80
Total carried to Exhibit A			\$1,462.15

* In these instances proper payment had been made to the employee in a combination of drafts, check and cash.

(Testimony of G. L. Crowe.)

Schedule 5

INTERIOR WAREHOUSE COMPANY

LIST OF AMOUNTS CHARGED BY THE BANK ON THE COMPANY'S BANK STATEMENTS SHOWING PAYMENTS WHERE PAID CHECKS AS EVIDENCE THEREOF ARE NOT AVAILABLE AND COMPANY'S CARBON COPIES OF THE NUMBERED CHECKS INDICATE THAT THE ITEMS WERE IN PAYMENT FOR SERVICES PAID FOR BY OTHER CHECKS OR DRAFTS OR THAT THE CHECKS HAD BEEN VOIDED AFTER THEIR PREPARATION

Date	Check Number	Payee	Amount
Dec. 5, 1938	4016	C. C. Elledge	\$ 99.00
Dec. 2, 1938	4004	Ed. Thorpe	76.03
Dec. 2, 1938	4003	Dick Sperry	11.09
Dec. 1, 1938	3965	Roy Lamb	89.10
Nov. 2, 1938	3762	Dick Sperry	34.16
Nov. 2, 1938	3761	Kemper Snow	87.12
Nov. 2, 1938	3760	Ed. Thorpe	120.78
Aug. 31, 1938	3499	J. W. Bradley	17.82
Aug. 31, 1938	3496	John Klamert	8.91
Aug. 31, 1938	3483	John Klamert	60.38
Dec. 10, 1936	B15920	W. H. Hemming	25.50
Dec. 1, 1936	A10622	Roy Lamb	80.00
Aug. 27, 1936	B15566	F. N. Alexander	43.20
Aug. 3, 1936	A10346	J. A. Frischknecht	50.00
July 9, 1936	B15367	A. Rieman	14.40
July 3, 1936	A10323	P. Henning	49.50
July 1, 1936	A10292	Roy Lamb	19.50
June 18, 1936	B15340	G. Edmonson	14.40
May — 1936	A10230	—————	49.50
Total carried to Exhibit A			<u>\$950.39</u>

(Testimony of G. I. Crowe.)

Schedule 6

INTERIOR WAREHOUSE COMPANY

LIST OF CHECKS NEGOTIATED IN PORTLAND WHICH
HAD BEEN WRITTEN PAYABLE TO AN EMPLOYEE
IN REIMBURSEMENT OF A PETTY CASH FUND,
WHERE EMPLOYEE HAD ACTUALLY RECEIVED
REIMBURSEMENT FROM ANOTHER SOURCE

Date	Check Number	Payee	Amount
Sept. 30, 1937	81	Frank D. Hatcher (en- dorsements include G. L. Crowe)	\$23.86
Sept. 30, 1936	A10485	Frank Hatcher	24.91
Total carried to Exhibit A			<u>\$48.77</u>
Date	Check Number	Payee	Amount
Jan. 4, 1937	A10689	R. W. Umbarger	\$7.60
Total carried to Exhibit A			<u>\$7.60</u>

The Court: Now, as to procedure, another copy should be run.

Mr. Jaureguy: Your Honor, I wonder if I might make an inquiry here. Counsel made the remark that he thought your Honor had said that Schedules 1, 2, and 3 were improper. I don't know whether your Honor is excluding those.

The Court: No, I limited that by saying only as to certain remarks which appeared, which you already had eliminated. Those are the things that I am excluding, the remarks at the top of the page in parentheses. Well, I don't know whether I called attention to Schedule 1. [86]

Mr. Jaureguy: I understand your Honor to say

(Testimony of G. L. Crowe.)

that that was proper, but apparently counsel understood you to say it was improper.

The Court: No, I think I said it was proper. Now as to the procedure, will counsel substitute a copy of this with the eliminations made?

Mr. Jaureguy: We are willing to proceed in either way Court or counsel desires, either to eliminate it by obliteration or substituting a copy.

The Court: As far as this Court is concerned it doesn't make any difference. I am simply excluding these remarks so that no one else will think that I was influenced by the auditor's testimony on the matter.

Mr. Jaureguy: If it is satisfactory to the Court counsel will get together and obliterate the parts that were excluded.

The Court: All right.

Mr. Jaureguy: I take it that we don't need to have the consent of the Court on each part obliterated.

The Court: No, I am making the rulings now. I am admitting it with those exceptions, and so far as I am concerned if you just mark on there "Not admitted" or something of that sort it will be satisfactory to me. I am not going to consider it anyhow.

Mr. Jaureguy: If we are not agreed among ourselves what the Court said but can agree that certain parts can be obliterated that is all right with your Honor? [87]

The Court: Yes. I think the record is perfectly clear on it.

(Testimony of G. L. Crowe.)

Mr. Jaureguy: Yes, I think so too.

Mr. Jones: You may cross-examine.

Cross-Examination

By Mr. Wood:

Q. Mr. Crowe, as to those 19 checks the originals of which you destroyed, you say you destroyed them before the audit. Do you mean the audit of May, 1939? A. Yes.

Q. How long before that audit did you destroy those 19 checks?

A. I couldn't answer that question without seeing the checks themselves. They were destroyed shortly after they came back from the bank.

Q. Will you look at the carbon copies of those checks here in evidence? That is No. 2. You find, do you not, that the checks began in May of '36 and ran through June, July, August, and December of that year, and none was in 1937, but they began again in August of '38, and November of '38, and December of '38? Is that correct? A. Yes.

Q. Now did you destroy all those 19 checks at one time or at separate times?

A. At separate times, probably two and three at a time.

Q. Two and three at a time, at separate times?

[88]

A. Yes.

Q. So that there would be about six or more occasions that you destroyed parts of 19 checks?

A. That would be an estimate.

(Testimony of G. L. Crowe.)

Q. Three into 19 would be about six different occasions? A. Yes.

Q. Now would the destruction occur the month following the return of the checks from the bank to the Interior?

A. Will you state the question again, please?

Q. For instance, take November of '38; there appeared to have been three checks in that month. The canceled checks, the paid checks, would come back to the Interior with the bank statement about December 1st of '38, would they not? A. Yes.

Q. And would you not destroy those particular checks shortly thereafter? A. Yes.

Q. And that was the method you used on all 19 of them? A. Yes.

Q. They were destroyed not long after the bank sent them back to the Interior? A. Yes.

Q. Now you were the man who got all of the paid checks of the Interior back from the defendant bank, were you not? A. Yes, sir. [89]

Q. Did you call each month at the bank and get those?

A. I did after a certain date. I don't recall what date I started doing that, but I did for a period of at least two years.

Q. At least two years, and before that somebody else got them from the bank? A. Yes.

Q. But when they came back from the bank, even when somebody else got them, you had access to them? A. That is right.

(Testimony of G. L. Crowe.)

Q. And they were really delivered to you, weren't they, by whoever got them from the bank?

A. Yes.

Q. That was part of your duties to have charge of these paid checks? A. Yes.

Q. And the bank statements accompanying the paid checks? A. Yes.

Q. It was also a part of your duty to draw the checks in the first place—have them drawn by somebody under your supervision?

A. That is right.

Q. Some girl typed them out, did she not?

A. Yes, sir.

Q. And when she typed them out she delivered them to you? [90] A. Yes, sir.

Q. And you would take them to one of the officials of the Interior and have him sign for the maker of the check? Is that right?

A. That is right.

Q. And after the checks were signed by the official of the Interior they were again delivered to you, were they not? A. That is right.

Q. And to no one else? A. That is right.

Q. And that is where the opportunity was given you to take the checks and sign the names of the payees on them? Is that right? A. Yes.

Q. Had you not had access to signing them in that fashion and before delivery to any payee you would not have been able to sign the payee's name?

Mr. Jones: Just a moment; that is objected to as incompetent, irrelevant, immaterial, and calling

(Testimony of G. L. Crowe.)

for a conclusion of the witness on a point that lays solely in the province of the Court.

The Court: Well, it is immaterial one way or the other. I will exclude it.

Q. (By Mr. Wood): Why were the signed checks always delivered back to you? [91] What would you do with them? What would your duties be in connection with these checks?

A. I would check them for their correctness and for the signature and give them to the girl to mail.

Q. Give them to the girl to mail? A. Yes.

Q. That is, as far as the country warehouses were concerned? A. Yes.

Q. But how about the dock? They weren't mailed out? A. No, sir.

Q. Did you personally take those checks down to the dock for distribution to the employees?

A. I may have on one or two occasions, but not as usual thing at all.

Q. How was it usually handled?

A. They were taken down by—I think I am right in saying the office boy.

Q. But on all occasions all checks for the pay-rolls, as well as these 107 checks, plus the 19 missing checks, came back to you after they were signed?

A. Yes.

Q. Was it part of your duties to reconcile the bank statement each month when you received it?

A. Yes, sir.

Q. And did you reconcile it each month? [92]

A. I did.

(Testimony of G. L. Crowe.)

Q. Of course over this period of time from September, '35 to May of '39 these shortages showed on the bank statement? A. No.

Q. They didn't show on the statement?

A. No.

Q. Not in any instance at all?

A. Maybe I didn't understand your question. State it again, please.

Q. We will take specifically these 19 missing checks. Those checks of course were paid by the bank, were they not? A. Yes.

Q. And the bank statement would show that they had been paid? A. That is right.

Q. But on the records of Balfour, Guthrie in some instances you marked on the carbon copy that they were void? A. In some instances, yes.

Q. But that was not true? The checks had actually been paid by the bank, had they not?

A. That is right.

Q. Of course as to those 19 checks, you knew our bank had paid them?

A. What do you mean by "our bank"?

Q. The defendant bank in this case.

A. The Bank of California? [93]

Q. Yes. A. Yes.

Q. That it had paid them?

A. That it had paid them.

Q. Did anybody else make any reconciliation of the bank account besides yourself? A. Yes.

Q. Who? A. Price, Waterhouse.

(Testimony of G. L. Crowe.)

Q. Well, you are speaking now about annual audits? A. Yes.

Q. Did they take all the bank statements each year and reconcile those against your reconciliation?

A. No, not all of them.

Q. Just a portion of them? A. Yes.

Q. In the nature of a test, is that it? They would check for some specific month, or something of that kind? A. Yes.

Q. Now in order to obtain the signatures of the officers to the checks that are in suit here you would lay before the officers the payroll showing the names of those employees and the amounts of the checks, would you not? A. Yes, sir.

Q. And as far as these 107 checks and perhaps the 19 also, those [94] particular payees were not entitled to those checks? A. No, sir.

Q. They hadn't worked for them and hadn't earned that money? Is that correct?

A. Well, they were duplications.

Q. Some of them were? A. Some, yes.

Q. How did the payroll show on those? Did it show those names and those amounts for those checks? A. Yes.

Q. And you had added those names and those amounts yourself? A. In some cases.

Q. Well, every time you asked them to sign checks did the name and amount appear on the payroll sheet? Would they sign a payroll check without the name being on the payroll? A. No.

(Testimony of G. L. Crowe.)

Q. So in each instance the name was on the payroll?
A. Yes, sir.

Q. And the amount was on the payroll?

A. Yes, sir.

Q. And the check corresponded?

A. Yes, sir.

Q. But as to some of these 107 where they were duplications you made those additions to the payroll?
A. Yes, sir. [95]

Q. Well, did that apply both to the dock payroll and the country payroll?
A. Yes.

Q. But at the time those additional names were put on by you you did not add those names or those amounts to the timebook kept by the superintendent at the dock, did you?

A. Not all the time, no.

Q. Did you add any names to the superintendent's timebook?
A. Yes.

Q. How did you have access to the superintendent's timebook?

A. That was an exception.

Q. An exception?
A. Yes.

Q. What does that mean?

A. I didn't have access to the book except as I was delegated to get the book at one particular date and bring it to the office.

Q. For whose inspection? Was it for your or somebody else's inspection?

A. Inspection by Price, Waterhouse.

Q. That was in 1939 for the purpose of that audit made in '39?

(Testimony of G. L. Crowe.)

A. I don't know whether I got that book in 1939 or not.

Q. Did you get it each year when the auditors were auditing? A. Yes.

Q. Each year did you add some names to that original timebook? [96]

A. I don't know whether I did each year or not. I did if my previous actions would justify it.

Q. That is, on every one of these checks on the dock payroll extending over this period from '35 to '39 you always saw that the names of those payees were always put in the superintendent's timebook? A. Oh, no.

Q. How many times did you do that?

A. Not over three times.

Q. About three times?

A. Not over three times.

Q. And that would be just three names? Three times would be three names?

A. I don't know how many names; probably one or two or three names.

Q. Each time? A. Yes.

Q. So that a maximum would be nine names, three times with three names each time?

A. Yes, I would think so.

Q. Did the auditors check those original timebooks in making the audits against these canceled checks?

A. They probably did. That would be part of their duty.

(Testimony of G. L. Crowe.)

Mr. Jaureguy: I move that be stricken as setting forth a conclusion of the witness. The question was all right; it [97] called for something that might be within his knowledge, but when he said, "It probably was their duty" that would be a conclusion of the witness.

The Court: Read me the answer.

(The answer of the witness was read.)

The Court: The answer is stricken.

Q. (By Mr. Wood): On each of the audits made by Price, Waterhouse I take it you worked with them.

A. Yes, I did part of the work.

Q. Was your designation payroll clerk for the Interior? A. Clerk.

Q. Having charge of these books and records for the Interior, you worked with the auditors when they made their audit? A. Yes.

Q. Do you know of your own knowledge whether or not they did make a comparison of the canceled checks and the original timebook of the superintendent of the dock?

A. No, I don't know.

Q. You don't know whether they did that?

A. No.

Q. But in any event, except for these nine names that you say you added to the superintendent's timebook, none of the other checks in issue here would appear on the superintendent's timebook?

A. I didn't understand the question. [98]

(Testimony of G. L. Crowe.)

Q. You say that on about three occasions you added not to exceed three names to the superintendent's timebook? Is that correct?

A. That was an estimate.

Q. That is your best estimate?

A. Yes, sir.

Q. And the superintendent's timebook is an original book where the time of the men is kept by the superintendent? A. Yes.

Q. Except for those nine names added by you, none of the other names represented by the checks in issue here, nor the amounts of the checks, nor the time supporting the amounts of the checks appear in the superintendent's time record?

A. No.

Q. Neither did it appear from the carbon of the payroll kept at the dock, did it?—any of those names? A. No.

Q. You didn't go back there and add names and amounts to the carbon of the payroll sheets at the dock? A. No.

Q. And you didn't add names and amounts to the carbon of the payroll sheets of the country warehouse?

Mr. Jones: If the Court please, I have let this go quite a while. It is considerably beyond the scope of my direct examination and entirely goes to make out Mr. Wood's own case [99] on negligence set forth in his answer. I feel that if he wants to make the witness his for those purposes

(Testimony of G. L. Crowe.)

at this time we have no objection, but it is entirely beyond what we went into, and we object to it on that ground.

The Court: Overruled. However, you will limit the examination. I think that you are spreading out the scope of it to a certain extent.

Mr. Wood: Very well. Was that last question answered, Mr. Reporter?

The Reporter: No, it was not answered.

Q. (By Mr. Wood): Do you remember the question, Mr. Crowe? A. No.

Mr. Wood: Please read it to him.

(The last question was read.)

The Court: He may answer.

A. I did not.

Q. (By Mr. Wood): Did you at any time have access to the carbons of the payroll sheets either from the country or the dock? A. No, sir.

Q. At any time during your employment with Balfour, Guthrie, outside of this audit that you just spoke about did any official of Balfour, Guthrie make any check of your payroll sheets or these checks or the reconciliation of the bank account?

Mr. Jones: The same objection, your Honor.

The Court: Yes, I will sustain the objection to that. In [100] the first place it isn't within the witness' field of knowledge.

Q. (By Mr. Wood): As to these 19 missing checks you of course don't have before you the endorsers which may or may not appear upon the reverse? A. No.

(Testimony of G. L. Crowe.)

Q. You cannot now see your signature on any of those 19 if it appeared there—I mean the name of the payee written in by you? A. No.

Q. How do you know that on those 19 checks you did write in the name of the payee?

A. Some by memory, and others by a scrutiny of the books of the Interior Warehouse Company.

Q. Do you remember that on some checks you used your own name too after signing the name of the payee on the back?

A. No, I wouldn't remember that.

Q. As to those 19 missing checks do you know who any of the endorsers were after you signed the name of the payee?

A. No, I am not certain.

Q. You couldn't tell where you negotiated a single one of those checks, could you, now, without just guessing?

A. No, sir, I couldn't.

Q. You knew, of course, these annual audits were taking place every year for the Interior, made by Price, Waterhouse? A. Yes. [101]

Q. Had you previously made any of those audits yourself when you worked for Price, Waterhouse?

A. No, I never worked on the Balfour, Guthrie job for Price, Waterhouse.

Q. At the time that the audits were made or just before the audits were to be made, aside from having put in these names on the payroll sheets

(Testimony of G. L. Crowe.)

and a few names on the superintendent's time record did you make any effort to alter the books or records or hide anything from the auditors?

A. Yes, sir.

Q. You did? A. Yes, sir.

Q. Further than that? A. Yes.

Q. What else did you do in the way of attempting to hide anything?

Mr. Jones: I think that is still open to the same objection that I made to the other question. It is completely beyond anything that I went into.

The Court: I will sustain the objection.

Q. (By Mr. Wood): Where the carbon copies of the checks were marked void but the check itself actually paid how would you make a reconciliation with the Interior's bank records to show that there was no shortage?

A. State the question again, please. [102]

Q. When you marked a carbon copy of a check void that the original of it had actually been negotiated and cashed there would be a shortage in the bank account of the Interior as reflected by its own books, would there not? A. Yes.

Q. How would that be covered up? It wouldn't jibe with the bank statement; it would show payment of that check marked void on the carbon.

A. To answer that question I would have to see the books to refresh my memory and follow the specific item through the books.

(Testimony of G. L. Crowe.)

Q. You have before you the exhibit of the carbons of the destroyed checks, haven't you?

A. Yes.

Q. And some of those are marked void, are they not? A. Yes.

Q. How many of them?

A. There are six so marked.

Q. You don't remember the method you now used so that that shortage wouldn't show on the company's books?

A. Before I answer that question, are you assuming that all six of these checks that are marked void were not actually voided checks?

Q. Well, you yourself, Mr. Crowe, testified that all 19 of those were negotiated by you and paid by the bank, as I understood the testimony—that the originals were all paid by the [103] bank and later destroyed by you.

A. We are talking about voided checks.

Q. That is right, out of this list of 19. Now in six instances there you marked "void" on the carbons, didn't you?

A. I didn't mark the carbon.

Q. You didn't mark the carbon of the checks void? A. No, sir.

Q. Who wrote that?

A. I don't recognize the handwriting.

Q. Well, in reconciling the bank statement at the end of the month would you check the originals of the checks against these carbon copies of checks kept in the Interior's office?

(Testimony of G. L. Crowe.)

A. If it was necessary to get a balance.

Q. Well, isn't that the general procedure when you reconcile a bank account? You take the checks and check them against carbon copies or stubs to see if the check is actually paid or not? What method did you use to reconcile the bank statement?

A. I would list the previous month's outstanding checks and start with the number. I would have my checks sorted in numerical order and then go through and to this list that I before mentioned add any other missing numbers. Then I would refer to the carbon copies to get the amounts, and if that balanced then I was reconciled.

Q. Now in addition to adding these names and amounts to the [104] country payroll sheets—the originals—and to the dock sheets did you also record in the monthly summary sheet a larger amount than the dock payroll actually showed?

A. Do you mean by actually showing before I had changed it?

Q. Yes. A. Yes.

Q. Did you in some instances raise on the payroll sheets the amounts that were really properly due the employees as reflected by the superintendent's or the country time book? A. Yes.

Q. How about this expense account? How did you work with the expense account in some cases?

A. Are you speaking of any particular expense account?

(Testimony of G. L. Crowe.)

Q. Well, expense items like repairs and insurance. Were you able to get checks on those signed by officials of the Interior without presenting supporting vouchers? A. No.

Q. Where would you get the supporting voucher when you were going to use that check yourself?

A. I never used such checks.

Q. No checks of that character?

A. No, sir.

Q. Have you ever seen this audit that Price, Waterhouse made in 1939?

A. A report of their audit? [105]

Q. Have you ever seen their audit?

A. No, sir.

Q. Did you ever make any direct entries in the ledger itself without any supporting entries in any other book? A. I don't remember.

Q. These bank statements that were given to the Interior each month, did they ever balance up with the Interior's books, or was there always a discrepancy from 1935 to 1939 between the bank statement and the Interior's books?

A. I don't remember. There may have been months when there was no discrepancy.

Q. There may have been occasions when they were out of balance, you say?

A. Where there was no discrepancy.

Q. There may have been months where there was no discrepancy? A. Yes.

Q. But you know of months that there were discrepancies? A. Yes.

(Testimony of G. L. Crowe.)

Q. There necessarily had to be or you wouldn't have obtained the money? A. Yes.

Q. And that would be true for practically every month from 1935 to 1939? A. Yes.

Mr. Wood: That is all. [106]

Redirect Examination

By Mr. Jones:

Q. Do you know when those carbons were marked void?

A. These particular ones I have here?

Q. Yes. A. No, sir, I do not.

Q. Of the 19 checks did I understand you correctly that there are only six carbons of those checks marked void? A. No.

Q. How many?

A. I have no way of telling.

Q. You didn't void them yourself—mark them void yourself?

A. No, this isn't my writing.

Mr. Jones: Would you bring that exhibit here, please?

Q. How long has it been since you have seen a time book, a dock time book?

A. It has been almost two years.

Q. The nine of course you testified to as an estimate, or three times? That is your best recollection? You have no way of knowing whether it is nine or six or twenty, do you?

A. No, sir.

Mr. Jones: Will you take this back to the witness?

(Testimony of G. L. Crowe.)

Q. I am going to call those numbers off to you, and you see how many of those checks are marked void of the 19 missing checks, starting in at 4016. If any of the numbers that I call off [107] are marked void you just say the word "void".

A. Yes, sir.

Q. 4016, 4004, 4003, 3965, 3762, 3761, 3760, 3499, 3496, 3483. Of the country's which is first, the "B" or the "A" series? A. B.

Q. All right, "B" series, 15920. A. Void.

Q. 15367, 15340. "A" series, 10622.

A. That is void.

Q. 10346. A. Void.

Q. 10323, 10292. So out of the 19 checks that you have records of there only three were actually void? Is that right? A. Yes, sir.

Q. Now when you used this word "voided" here all you mean is there is a pencil notation appearing on the carbon copy with the word "void"?

A. Yes.

Q. And that is what you said you don't know who put it on? A. Yes.

Q. Nor when it was put on? A. No.

Mr. Jones: That is all.

Mr. Wood: That is all.

(Witness excused.) [108]

Mr. Jones: The plaintiff rests.

The Court: It is ten minutes to five, Gentlemen, and I think we might as well start in in the morn-

ing. Court is now in adjournment until tomorrow morning at 10:00 o'clock.

(Thereupon, at 4:50 o'clock P.M., March 26, 1941 an adjournment was taken until 10:25 o'clock A.M., March 27, 1941.) [109]

Portland, Oregon, March 27, 1941
10:25 o'Clock A. M.

(Pursuant to adjournment.)

Mr. Wood: Before calling our first witness, your Honor, I would like to hand Court and counsel the trial brief in two sections giving defendant's theory of the law controlling the defense. Call Mr. Griffis.

R. G. GRIFFIS

was thereupon recalled as a witness in behalf of the defendant herein, and testified further as follows:

Direct Examination

By Mr. Wood:

Q. Mr. Griffis, what is your present position with the Interior Warehouse Company?

A. I am an accountant for Balfour, Guthrie & Company which keep the books of the Interior Warehouse Company.

Q. Did you succeed to the position formerly occupied by Crowe? A. Yes.

(Testimony of R. G. Griffis.)

Q. When did you succeed to that position?

A. June, 1939.

Q. Prior to that time had you as an employee of Price, Waterhouse participated in any of the annual audits of the Interior's books?

A. Yes.

Q. Which year, do you remember? Of course you were on in '39? [110]

A. Yes. I don't remember whether I was on any before that or not.

Q. In the capacity you just mentioned you had custody and charge of the records, books, and documents of the Interior during the period involved here, '35 to '39?

A. Yes.

Q. Do you have them here in court?

A. Yes.

Q. Will you produce the Bank of California's statements to the Interior by the bank during the period from 1935 to May, 1939?

A. They are all in one box there.

Q. I think that is 24. A. Here it is.

Q. Are those the bank statements?

A. Yes.

Q. Are you also able to pick out the original time books—not the payroll sheets—covering the same period? That appears to be Pre-Trial Exhibit 23.

(The exhibit was handed to the witness.)

Mr. Wood: Would you also hand the witness, Mr. Bailiff, if you please, that audit of Price, Wa-

(Testimony of R. G. Griffis.)

terhouse? That is No. 3. That went in yesterday.

Q. Now Mr. Griffis, since you participated and assisted in getting up the audit for 1939 are you familiar with the then existing bookkeeping system and the method of operation under [111] it used by Interior at that time? A. Yes.

Q. What if any change was made in that system or the method of operating under it between the time Crowe was employed and the time you were employed in June, 1939?

Mr. Jones: If the Court please, the plaintiff at this time wishes to object to this question and all similar lines of questioning on the ground that any change made in the system does not go to prove negligence in the method of handling prior to that time. It is irrelevant and immaterial. I might as well at this time also interpose a general objection to all questions having to do with negligence or an attempt to prove negligence under the defendant's answer on the ground that the Interior Warehouse Company owed no duty of any kind to the Bank of California such as is alleged in the answer to keep its books or to reconcile its bank account, or in respect to keeping books or reconciling its bank account. Both plaintiffs are objecting to any and all evidence on that ground because there is no duty owed to the Bank of California.

The Court: The answer has passed out of the situation.

(Testimony of R. G. Griffis.)

Mr. Jones: Well, I will have to refer to the pre-trial order and cite the issues then that are made in that. It comes up on the 12th, 18th, 19th, 20th, and 21st issues as set forth in the pre-trial order.

The Court: Apparently these are set up as issues. [112]

Mr. Jones: Please?

The Court: Apparently that is set up as an issue.

Mr. Jones: It is set up as an issue, but even though it is set up as an issue that wouldn't preclude plaintiff's right to object to testimony going to prove it, your Honor.

The Court: I think it is an issue. The testimony will be admitted.

Mr. Wood: Will you read the question to him, Mr. Reporter?

(The question was read.)

Mr. Jones: Referring to a particular objection rather than a general one, of course we are objecting to any testimony as to subsequent changes.

The Court: I will sustain the objection on that ground.

Mr. Wood: On the theory that that is an improper way to prove it, your Honor?

The Court: Any subsequent changes by a person after an event which has indicated that it might be negligent, and that person has been warned beforehand, are not competent to prove the negligence.

Mr. Wood: Let me put it this way and see if there is any objection:

(Testimony of R. G. Griffis.)

Q. If any change was made, why was the change made?

Mr. Jones: Same objection.

The Court: Yes, same ruling.

Q. (By Mr. Wood): Now in that box that you have before you, Pre [113] Trial Exhibit 24, what are the contents of that box?

A. These are the bank statements and paid checks of the Interior Warehouse Company for the period under discussion.

Mr. Wood: I offer them in evidence.

Mr. Jones: No objection.

The Court: Admitted.

(The box of bank statements and paid checks, heretofore marked Defendant's Pre-Trial Exhibit No. 24, was thereupon received in evidence.)

Q. (By Mr. Wood): Please state to the Court what Pre-Trial Exhibit 23 is.

A. These are the timebooks of Irving Dock.

Q. During that same period? A. Yes.

Mr. Wood: I offer them in evidence.

Mr. Jones: We object to the timebooks being received in evidence, Pre-Trial Exhibit 23, on the ground that they are irrelevant, incompetent, and immaterial. I would like to also add to that objection that there is no duty on the part of the drawer of these checks to compare the amount of the checks or the amounts on payrolls with the timebooks at the dock office.

(Testimony of R. G. Griffis.)

The Court: The matter has been gone into in your case in chief regarding changes that were being made on these books and whether there were changes made, and under the circumstances I think they are admissible. [114]

Mr. Jones: That was only on cross-examination, was it not, your Honor?

The Court: Well, as I remember, there were some questions on direct as to what was done regarding the dock books.

Mr. Crowe: Well, I know that I didn't ask Mr. Crowe a thing about it. I don't think I asked Mr. Griffis a thing about it. I am sure I didn't even mention timebooks to either of those. If it occurred with anybody I think it would be something that Mr. Rawlinson said in answer to a question. There was no attempt on my part to solicit the information. I am sure the question itself was not directed to that.

The Court: In any event the cross-examination was proper on the basis that it was laid, and the testimony on cross-examination of course is binding on you. I don't remember any objection to that cross-examination, and inasmuch as you have put in an explanation as to how the discrepancies first appeared, and these seem to be connected with that in some way, I shall admit them. Objection overruled.

(The time books, heretofore marked Defendant's Pre-Trial Exhibit No. 23 were thereupon received in evidence.)

(Testimony of R. G. Griffis.)

Q. (By Mr. Wood) Were there any time books kept out in the country warehouses? A. No.

Q. What was the method of keeping time in the country warehouse? [115]

A. The payroll is made up in such a way that the time is kept on the payroll.

Q. On the payroll sheets? A. Yes.

Q. In that respect the system differed from the method of handling at the dock? A. Yes.

Q. Do you have here carbons of those payroll sheets, both in the country and on the dock?

A. There are some here from the country but not all of them, due to the fact that the country agents have to have them for the names of the employees, but the dock is here and some of the country ones are here.

Mr. Wood: Will you hand the witness No. 34, Mr. Bailiff, and 26, please, while you are there; No. 22 also.

Q. Do you find Pre-Trial Exhibit 34?

A. These are the duplicate Irving Dock payrolls.

Q. Where are the duplicates for the country?

A. Some of them are right on top there.

Q. Do you now have the duplicate pay sheets for the dock?

A. Would you repeat that again?

Q. Do you now have the duplicate carbons of the pay sheets for the dock?

(Testimony of R. G. Griffis.)

A. For the dock and the country, yes.

Q. What number is that? [116]

A. Thirty-four for the country.

Q. And which is the dock?

A. The number has been taken off. They were wrapped up. I don't know the number.

Q. You are thoroughly familiar with these books and records?

A. Yes.

Mr. Wood: Perhaps the witness could help the bailiff, your Honor. I am not familiar with those.

The Court: The court will take a recess.

(A recess was then taken, after which proceedings were resumed as follows):

Mr. Jones: If the Court please, in connection with the general objection I started to make at the beginning of the testimony I wish to call the Court's attention to the last paragraph of the pre-trial order in which we say, after those issues are stated, "Excepting, however, the plaintiffs do not regard the issues stated in Paragraphs 11, 12, 18, 19, 20, and 21 of Article VII as material in this case." We have tried from the time of preparing the pre-trial order as best we could to take the position that we owed the bank no duty in the respects mentioned in those issues that are found in Paragraphs 12, 18, 19, 20 and 21, and that consequently all of this line of testimony is irrelevant, immaterial, and incompetent. At the time of drawing the pre-trial order I felt that if the other side wanted to make an issue it had the right to make [117] the issue and we could come in

(Testimony of R. G. Griffis.)

here and object to evidence to support the issue, just the same as under the old practice when the issue is made on the pleadings.

The Court: That is quite correct.

Mr. Jones: But in order to save our position I put it in here, and I wish to renew our objection and call attention to the fact that we have saved it all along.

The Court: Yes, you have saved it, and I still admit the evidence that I have let go in so far. You may base an exception on this position that you now take.

Mr. Jones: I don't want to be constantly popping up in order to save that objection every time a question is asked, but the next time one bears on it I want to make it and have it as a continuing objection if you care to have a continuing objection, otherwise I will make them each time.

The Court: I would rather you would make them each time.

Mr. Jones: All right.

The Court: It makes a much better record. Proceed.

Q. (By Mr. Wood): Mr. Griffis, you now have in your possession Pre-Trial Exhibit 34?

A. Yes.

Q. What is that Pre-Trial Exhibit 34?

A. That is the duplicate payroll records of the dock and part of the country.

Q. For the period in question here? [118]

A. Yes.

(Testimony of R. G. Griffis.)

Q. September 1, '35 to May 2, '39?

A. Yes.

Mr. Wood: I will offer them in evidence.

Mr. Jones: We object to them as incompetent, irrelevant, and immaterial, and on the further ground that the dock payrolls are not mentioned in the pre-trial order, as near as I can tell from the pre-trial exhibits.

The Court: That is a vital objection, it is true.

Q. (By Mr. Wood): Do you have them all there, all together, Mr. Griffis?

A. Yes. Could I see a copy of that pre-trial exhibit? Maybe I could pick it out.

Q. The pre-trial order? A. Yes.

(A copy of the pre-trial order was handed to the witness.)

The Witness: I can't find it here.

Q. (By Mr. Wood): How long have those records been here?

A. The records were all brought in at one time.

Q. At pre-trial? A. Yes.

Q. And did you yourself compile this list of records? A. No.

Q. Did you work with whoever did compile them?

[119]

A. Yes, that was the list that was made.

Q. Did you not include the dock payroll carbons as well as the country carbons?

A. I don't know. It does not seem to be typed in here.

(Testimony of R. G. Griffis.)

Q. Was there a cover on those carbons?

A. No, there was no cover. They were wrapped up in one sheet of paper with a string around.

Q. Were the country payroll carbons with them?

A. I wouldn't say, there were so many things there.

Mr. Wood: I now offer in evidence Exhibit 34, the carbons pertaining to the country warehouse pay sheets which the witness has identified.

Mr. Jones: We have already objected to it as incompetent, irrelevant, and immaterial.

The Court: The Court overrules the objection. As I understand it, these exhibits now offered as Exhibit 34 are part of the basis for the audit which has already gone into evidence.

Mr. Jones: No, your Honor, that is not our understanding, because the country payroll originals, which are Pre-Trial Exhibit No. 21, are part of the audit, and there is no duty as we understand it on the part of any auditor or bookkeeper to go beyond the original copies and go back to the carbon copies that were made for the agent's information to keep at his office up in the country. They never come to the main office and no auditor [120] would refer to them in making an audit. We feel that they are entirely immaterial and I am sure were not gone into in any way on our case.

The Court: Well, I am not going to rule that the duty of an auditor doesn't extend that far. I don't know what the duty of an auditor is, and I don't know

(Testimony of R. G. Griffis.)

why all the records of the corporation aren't the basis of an audit.

Mr. Jaureguy: Could I extend that objection?

The Court: Yes.

Mr. Jaureguy: On the ground that the question of the duties of the auditor in making an audit is not an issue in the case, as long as the auditor gets out the information that is requested in getting the audit, which was done in this case, and we make the objection on the ground that the depositor owes no duty to the bank to examine either the carbon copies or the time books, its duty being to examine the checks themselves and determine that they are valid checks.

The Court: Objection overruled.

(The duplicate payroll records, heretofore marked Defendant's Pre-Trial Exhibit No. 34, were thereupon received in evidence.)

Mr. Wood: The witness has identified carbon copies of the dock payroll sheets. It is true that I find no express pre-trial number given those. These books and records, your Honor will remember, were all brought up by the other side at the time [121] of pre-trial and have been in the custody of the Court ever since. This witness has now identified the carbon copies of the dock records. It is true that in 34 the limitation is as to country payrolls, but with his identification I move, your Honor, that we be permitted to mark "34-A" upon the carbon copies of the dock payrolls and that they be admitted under

(Testimony of R. G. Griffis.)

this witness' identification of them as the carbons of the dock payrolls.

Mr. Jones: If the Court please, in the first place we didn't bring them up here except that maybe we got them out on your order and demand and brought them up here as your exhibits, on your request. 21 says, "Country payroll sheets." 22 says, "Dock payroll sheets." It made a complete statement on the face of the pre-trial order that there were dock payrolls as well as country payrolls. That information has been there. They skip down to 34 and ask for duplicates of one of them. If they hadn't been on the face of the order there might be some excuse in saying that they were lost in the whole mass, but they have the third and fourth items in the list, and then they do down and ask for duplicates of them, and I don't think there can be any suggestion of failure on the part of the plaintiffs in not calling their attention to them.

The Court: The objection is sustained.

Q. (By Mr. Wood): Mr. Griffis, are you familiar with the 107 checks designated here as Pre-Trial Exhibit 1? A. Yes. [122]

Q. And are you familiar with the carbon copies of the 19 checks designated as Exhibit 2?

A. Yes.

Q. Referring now to Pre-Trial Exhibit 34—do you wish to check those and the carbons also?

A. Yes.

Q. Will you hand him Pre-Trial Exhibits 1 and 2? I will ask you how many, if any, of those checks,

(Testimony of R. G. Griffis.)

Exhibit 1, or the carbons, Exhibit 2, appear upon Exhibit 34.

Mr. Jones: On the same ground, that there is no duty on our part or on the part of an auditor that we may employ, to make this sort of a check for the benefit of the defendant in this case, we object to it, and on the further ground that it is incompetent, irrelevant, and immaterial.

The Court: I am not admitting these on any theory, Mr. Jones; I am simply saying in view of the situation I think that they are competent, that is, in view of the fact that the other records have been introduced. Now as to what theory that may lend itself to is a different matter. I am simply ruling on the admissibility in evidence. I have admitted them, and I now admit this testimony. The checks themselves are in evidence—you introduced them—and I think it is perfectly proper to go into the other records of the company to show what the situation was.

Mr. Jones: Well, off the record, I don't like to keep jumping [123] up either. As far as handling it, I would just as leave make a continuing objection, but I am only doing it to follow your own—

The Court (Interrupting): Yes, there is nothing that I have said that would prevent you from making that objection. You should have it in the record. I am simply explaining the theory of the Court so there won't be any doubt as to what I am doing.

(Testimony of R. G. Griffis.)

The Witness: Can I ask you again what you want me to do?

Mr. Wood: Will you read that question to him, Mr. Reporter?

(The question was read as follows: "I will ask you how many, if any, of those checks, Exhibit 1, or the carbons, Exhibit 2, appear upon Exhibit 34.")

A. Well, that is hard to say.

Q. Can you reverse that? How many do not appear?

A. I think that would be pretty hard to say, whether they do or don't, because you can't check them to this very readily.

Q. Would the audit, Exhibit 3, assist you in making that check?

A. Well, due to the fact that these are duplicate records and were not used in the office you can't check very well these checks to this record.

Q. Are you able to do it off the audit, Exhibit 3?

A. You mean to check these checks to this audit?

Q. To see which checks, if any, do not appear on the carbons of country payrolls.

A. I can do it indirectly but I can't do it directly to this.

Q. Can you do it by the audit? [124]

A. No.

Q. How do you mean, indirectly, Mr. Griffis? I don't understand.

A. First of all, you would have to check them to the original payroll.

(Testimony of R. G. Griffis.)

Mr. Wood: Those are here. Will you hand the Witness Exhibit 21, and also 22 while you are there, Mr. Bailiff, to save time?

The Court: I think that I am not going to take the time of the Court. If the witness wants to he can take these records outside of court and check them back and tell how he did it on the stand, but I don't think I should waste the time of the Court.

Mr. Wood: I don't blame your Honor. This is the only witness thoroughly familiar with them, though, and he is on the other side.

The Court: But you are calling him as your witness.

Q. (By Mr. Wood): Can you make that check readily? A. Yes.

Mr. Jaureguy: And we wish to enter our objection as to him calling him on the other side. This happens to be an employee of our assignor, but that doesn't prevent them from talking to him.

The Court: I have already made the point that he is their witness.

Mr. Wood: He says he can do it readily on Pre-Trial Exhibits 21 and 22, your Honor. [125]

A. Those are the original payroll records.

Q. Of both the country and the dock?

A. Yes.

Mr. Wood: I offer them in evidence.

Mr. Jones: For the same reasons we object to those being admitted.

The Court: Now as I understand it, the subsidi-

(Testimony of R. G. Griffis.)

ary objection doesn't apply to these because there is no question but what these original records were used as a basis for the audit.

Mr. Jaureguy: That is right. There is no question about that, and there is also no question about the pre-trial order.

The Court: The objection is overruled. The exhibits are admitted.

(The country payroll sheets, heretofore marked Defendant's Pre-Trial Exhibit No. 21, and the dock payroll sheets, heretofore marked Defendant's Pre-Trial Exhibit No. 22, were thereupon received in evidence.)

Q. (By Mr. Wood): Do you have those before you now, 21 and 22?

A. I just want 21.

The Court: I now direct that the witness make no computation on the witness stand. If he wants to make that computation outside and then come on and tell how he did it I will permit that, but I will not permit him to sit here and make a lot of computations. [126]

Mr. Wood: I am not asking him to do that; I just want him to check the names——

The Court: (Interrupting) I am not going to permit him to do that in court. He can take that out of court to do that. Go ahead with any other examination.

Mr. Wood: If I may have the privilege of recalling him after the noon recess I will have him do that.

(Testimony of R. G. Griffis.)

The Court: Yes.

Mr. Wood: Will you hand the witness Exhibits 19 and 20, please?

Q. State what they are, please.

A. Exhibit 19 is the general ledger of Interior Warehouse Company.

Q. Covering the period of time involved in issue here? A. Yes.

Q. And 20 is what? A. General journal.

Mr. Wood: I offer them in evidence.

Mr. Jones: We object to them as incompetent, irrelevant, and immaterial, and I will add to it that they do not go to show that we violated any duty owed to the defendant.

The Court: Both of these were used as a basis of your audit, and on that basis I admit them.

(The general ledger, heretofore marked Defendant's Pre-Trial Exhibit No. 19, and the general journal, [127] heretofore marked Defendant's Pre-Trial Exhibit No. 20, were thereupon received in evidence.)

Mr. Wood: Mr. Bailiff, will you kindly hand the witness Pre-Trial Exhibits 25 and 26?

Q. Will you state what Pre-Trial Exhibit 25 is?

A. 25 are the Irving Dock payrolls from November, 1935 to February, 1936.

Mr. Wood: I offer them in evidence.

The Court: The originals?

A. The originals.

Mr. Jones: The same objection.

(Testimony of R. G. Griffis.)

The Court: On the same basis the Court admits the exhibit.

(The dock payroll sheets, heretofore marked Defendant's Pre-Trial Exhibit No. 25, were thereupon received in evidence.)

Q. (By Mr. Wood): What is Pre-Trial Exhibit 26, Mr. Griffis?

A. 26 are duplicate payroll checks.

Q. Covering what period of time?

A. From February, 1937 to December, 1938.

Q. Did you or anyone else of the Price, Waterhouse people use those in connection with the audit of 1939?

Mr. Jones: We object to——

Mr. Wood: (Interrupting) I withdraw that question. I offer the exhibit. [128]

Mr. Jones: We object to the exhibits on the ground that they are incompetent, irrelevant, and immaterial, do not go to prove any allegations or any issues stated in the pre-trial order of the duty we owed to the defendant, and as I recall, none of the carbon copies of checks went into any examination, direct or cross, on the plaintiffs' case except those that were made a part of and received as Exhibit 2.

Mr. Wood: Your Honor, we are not shut out in our evidence to what they introduced in their case. We don't have to respond just to the evidence they put in. We are presenting our own defense.

(Testimony of R. G. Griffis.)

The Court: I understand that. I want to make it perfectly clear, as I have before, that I am not ruling on your theory of the defense and that I am not admitting the documents on that basis. However, I think with an audit having been introduced here and pertinent documents relating to the audit that I shall receive them.

(The duplicate payroll checks, heretofore marked Defendant's Pre-Trial Exhibit No. 26, were thereupon received in evidence.)

Q. (By Mr. Wood): Please state what Pre-Trial Exhibit 27 is.

A. Those are the expense reports from the country agents.

Mr. Wood: I offer it in evidence.

Mr. Jones: The same objection.

The Court: I didn't catch the answer. [129]

The Witness: They are the expense reports from the country agents.

The Court: How are those pertinent to the audit?

Mr. Wood: Let me ask the witness a question or two on that.

Q. Did your audit disclose that Crowe used the expense account of the country agents in any manner in forging these checks?

Mr. Jones: If he didn't prepare that he is asking for a hearsay answer.

Mr. Wood: He said he worked on the audit himself, that he himself worked on the audit.

(Testimony of R. G. Griffis.)

Mr. Jones: If he knows personally I have no objection.

Mr. Wood: That is what I am asking him, if he does know.

The Court: Yes.

The Witness: I wouldn't swear to it.

Q. (By Mr. Wood): You worked on that audit yourself?

A. I worked on it, but I can't remember.

Q. Would the audit refresh your recollection? Have you got that audit there, No. 3?

A. Yes.

Q. Turn to the reference to expense account at the top of Page 3. Do you find that?

A. Yes.

Q. Does that refresh your recollection of having made an examination of the expense account?

A. Yes, those expense accounts were used. [130]

Q. That exhibit that you have there, 27, relates to the expense account? A. Yes.

Mr. Wood: I offer it in evidence.

The Court: Admitted.

(The expense reports from country agents, heretofore marked Defendant's Pre-Trial Exhibit No. 27, was thereupon received in evidence.)

Q. (By Mr. Wood): Please refer to Exhibit 28. What is 28?

A. 28 are carbon copies of checks for Irving Dock and country payrolls for 1935 to 1937.

(Testimony of R. G. Griffis.)

Mr. Wood: I offer them in evidence.

Mr. Jones: Same objection.

The Court: Same ruling.

(The carbon copies of checks for dock employees and country employees, heretofore marked Defendant's Pre-Trial Exhibit No. 28, were thereupon received in evidence.)

Q. (By Mr. Wood): Please state what Pre-Trial Exhibit 29 is.

A. They are duplicate checks from January to June, 1939.

Mr. Wood: I offer them in evidence.

Mr. Jones: Same objection.

The Court: So I get clear on this, how do those relate to it?

Q. (By Mr. Wood:): Was any data in Pre-Trial Exhibit 29 used by you or any of the other auditors of Price, Waterhouse, in [131] making the audit? You used all the books and records in making the audit, did you not?

A. Yes, sir, you have access to all the records.

Q. And those were used?

A. Yes.

Mr. Wood: I offer them in evidence.

The Court: Admitted.

(The duplicate checks from January to June, 1939, heretofore marked Defendant's Pre-Trial Exhibit No. 29, were thereupon received in evidence.)

(Testimony of R. G. Griffis.)

Q. (By Mr. Wood): What is Pre-Trial Exhibit 30?

A. Payroll and expense summaries.

Mr. Wood: I offer it in evidence.

Mr. Jones: Same objection.

The Court: Admitted.

(The payroll and expense summaries, heretofore marked Defendant's Pre-Trial Exhibit No. 30, were thereupon received in evidence.)

Q. (By Mr. Wood): State if you know what Pre-Trial Exhibit 31 is.

A. They are the drafts from the country agents.

Q. Covering what period?

A. Covering this period of time.

Mr. Wood: I offer them in evidence. [132]

Mr. Jones: Same objection.

The Court: Drafts?

Mr. Wood: Yes, your Honor, this audit refers to paying some of the men in the country by draft, and then later there is a check covering that same identical draft.

The Court: They are admitted.

(The drafts from country agents, heretofore marked Defendant's Pre-Trial Exhibit No. 31 were thereupon received in evidence.)

Q. (By Mr. Wood): What is Pre-Trial Exhibit 32?

A. Duplicate expense checks.

Mr. Wood: I offer it in evidence.

(Testimony of R. G. Griffis.)

Mr. Jones: I am making the same objection to that, and call attention to the fact that nowhere during the testimony do I remember anything about duplicate expense checks ever being referred to anywhere.

Mr. Wood: This audit refers to a duplication through the expense account. The audit itself makes reference to it.

The Court: What page?

Mr. Wood: At the top of Page 3, the fourth line, "Charging labor, repairs, insurance or other expense accounts without proper support", the audit says, "contra entry being to accounts payable to which irregular disbursements had been charged." Then there is a reference in this schedule. Well, those other references are in a part of this exhibit which your Honor did not admit. [133]

The Court: The objection is presently sustained.

Q. (By Mr. Wood): What is Pre-Trial Exhibit 33?

A. Those are expense statements and vouchers.

Mr. Wood: I offer them in evidence.

Mr. Jones: Same objection.

The Court: That refers to the expense account which we have been——

Mr. Wood (Interrupting): But not duplicates. The prior one was duplicates, and this refers to that language I called your Honor's attention to at the top of Page 3.

The Court: They are admitted over the objection.

(Testimony of R. G. Griffis.)

(The expense statements and vouchers, heretofore marked Pre-Trial Exhibit No. 33, were thereupon received in evidence.)

Q. (By Mr. Wood): What is Pre-Trial Exhibit 35, if you know?

A. The deposit book.

Q. Covering the period involved here?

A. Yes.

Mr. Wood: I offer it in evidence.

Mr. Jones: Same objection.

The Court: Is there any reference to that?

Mr. Wood: I don't see any statement about the deposit book in here. I don't think it was referred to in the audit.

Q. Let me ask you, in making the audit did you have access to that deposit book? Was that part of the data furnished you [134] for the purpose of compiling the audit of '39? As a matter of fact, all this material was furnished to you, wasn't it, for your inspection? A. Yes.

Q. Including this deposit book? A. Yes.

Mr. Wood: I offer it in evidence.

Mr. Jaureguy: If your Honor please, it seems to me that that certainly would not be sufficient. The auditors go into everything that is offered them. It isn't what is offered them, it seems to me, it is what is used.

The Court: I think that is correct. Unless he testifies it was used I won't admit it.

(Testimony of R. G. Griffis.)

Q. (By Mr. Wood): Do you recollect whether it was used in compiling that audit?

A. I don't remember.

The Court: The objection is presently sustained.

Mr. Wood: With the understanding that we already have, that during the noon hour he may make that computation, I will excuse this witness now.

The Court: Do you desire to reserve cross-examination?

Mr. Jones: Yes, if your Honor please.

The Court: The witness may be withdrawn.

(Witness withdrawn.) [135]

CHARLES E. RAWLINSON

was thereupon recalled as a witness in behalf of the defendant herein, and testified further as follows:

Direct Examination

Mr. Wood: Will you hand the witness the audit, Exhibit 3?

Q. (By Mr. Wood): Mr. Rawlinson, there have been introduced here Pre-Trial Exhibits 19 to 35, inclusive, excepting 32 and 35. Do you recognize those exhibits there before you?

A. I have 3, 1, 2, 34. Any more? Do you refer to any others?

Q. All those exhibits that are there before you, including those numbers, do you recognize those as data furnished you for the purpose of making the audit of '39?

A. I do.

(Testimony of Charles E. Rawlinson.)

Q. And were they used for that purpose?

A. Such information therefrom as was necessary for our purpose.

Q. Now, in making your audit did you check any of these 107 checks or the 19 checks represented by carbons back against the country payroll carbons?

A. We did when we—no, the 106 wouldn't be on the carbons from the country.

Q. Those were all dock—107?

A. No, some of them were country, but some of these——

Mr. Jones (Interrupting): Just a minute before you go any further with that. I am going to interpose an objection to the testimony of this witness on the ground that it is incompetent, [136] irrelevant, and immaterial. The Interior Warehouse Company, our assignors, owes no duty whatever to the defendant in this case to make any checks such as referred to in any of the issues in Paragraphs 12, 18, 19, 20, and 21 of the pre-trial order, and for that reason the testimony would not be competent or relevant in this case at this time.

The Court: Again the Court isn't ruling on the theory. This particular question may be answered.

Q. (By Mr. Wood): Do you remember the question, Mr. Rawlinson?

A. No. I should like to make one point clear. You keep referring to the audit, and it has been referred to loosely as referring to two different phases of work. It has been used in referring to the an-

(Testimony of Charles E. Rawlinson.)

nual examination conducted by us, and it has also been used with reference to this investigation. It is sometimes a little difficult for me to tell when you ask the question whether you infer that we did a certain piece of work in connection with an annual examination or whether we did it in connection with this specific investigation. I think unless you specifically ask me I will understand that you will make reference solely to the work done in connection with this investigation as reported upon in Exhibit 3.

The Court: The rulings of the Court have been based upon the exhibit which the Court referred to as an audit.

Mr. Wood: Will you read the question, Mr. Reporter?

(The record was read by the reporter.) [137]

The Witness: Shall I continue?

Mr. Wood: It is my understanding that the Court has ruled you may.

The Court: Yes.

A. (Continuing) Some of those represented checks supporting fictitious payrolls—original payrolls prepared and written by a person other than the country agent, the actual country agent. On the face of them they appeared regular. They turned out later to be spurious.

Q. (By Mr. Wood): They appeared regular from the original country payroll?

(Testimony of Charles E. Rawlinson.)

A. They did.

Q. Did I ask whether or not you made a check against the carbon of that payroll?

Mr. Jones: Same objection.

The Court: Yes.

A. In our investigation we found that there were not carbon copies for certain of the purported originals in the Portland office.

Q. (By Mr. Wood): Do you remember how many were missing on that? Did the investigation show? Does your audit show?

A. Specifically not, but they would be included in this group of checks which were written to Portland employees and were actually paid by other checks drawn at Portland.

Q. Which schedule is that? [138]

A. That is Exhibit A; your Pre-Trial Exhibit 3, our Exhibit A. They would be included in that group.

Q. Schedule A as qualified afterwards breaks down the checks to the individuals?

A. Well, Schedule 3 supporting Exhibit A contains that list. It doesn't say specifically on its face whether all of these items were supported by spurious payrolls, or shall we call them payrolls which appeared regular on their face but for which no carbons were in existence, as subsequent events show.

Q. Do any of those names appearing on Schedule 3 attached to Exhibit A of the audit appear on the country payroll carbons?

(Testimony of Charles E. Rawlinson.)

A. They do.

Q. All of them?

A. Yes, the heading of the list says, "List of checks negotiated in Portland which had been written payable to country employees who were actually paid by other checks drawn in Portland." [The implication of the heading of the schedule there is that these people were also legitimately on country payrolls, and looking down the names, from the work that we have done, they appear familiar.

Q. Those are duplicate payments?

A. Yes.

Q. I am not speaking about duplicate payments. I am speaking of a single check being drawn—whether or not in that case you checked back against the carbons of the country payrolls. [139]

A. You mean whether during our examination we checked back all the checks against the carbons?

Q. That is right.

A. I don't think the procedure would develop that way. I think we would check them back against the payrolls that were available, the originals, and then we obtained the carbons from the country and compared the carbons with the originals.

Q. You did compare the carbons with the originals?
A. We did.

Q. Are you able to tell the Court any discrepancies there might have been between those two, the originals and the carbons?

(Testimony of Charles E. Rawlinson.)

A. Not directly, but it would appear that all this list would be differences.

Q. Which list are you referring to?

A. Schedule 3 of our Exhibit A.

Q. It would appear that none of those names——

The Court: (Interrupting) Just a moment, let's give the pre-trial exhibit number.

A. Pre-Trial Exhibit No. 3.

Q. (By Mr. Wood): It would appear that none of those names appeared upon the carbons of the country payrolls?

A. They all appeared upon the carbons but not supporting this particular group of checks.

Q. Well, as to this particular group of checks there was no reference made on the carbons to them, was there? [140]

A. Probably not. I say probably not because I would have to recheck them to be sure that they didn't. This work was done a considerable time ago, but the indication from the heading of the schedule is that that would be the situation.

Q. And what would be the situation in Portland with reference to carbons of payrolls?

A. You are referring now to the dock payrolls?

Q. Dock payrolls and not in the case of duplicate payments.

Mr. Jones: The same objection.

Mr. Wood: Referring only to single payments.

Mr. Jones: And furthermore, the duplicates are not in evidence here.

(Testimony of Charles E. Rawlinson.)

The Court: I think that this is really cross-examination as far as this particular thing is concerned. I will sustain the objection.

Q. (By Mr. Wood): Please refer to Exhibit 3, Page 3, at the top of the page. Your audit lists five methods allegedly used by Crowe in effecting these peculations, does it not? A. It does.

Q. The first one says, "Increases in dock and country payrolls by adding names and amounts thereto"——

Mr. Jones: (Interrupting) Now if the Court please, we introduced this payroll yesterday. Mr. Wood cross-examined on all of the things he has gone into now as much as he wanted to, and all he is doing today is perpetuating or continuing the [141] cross-examination that he did yesterday, and we object to this line of testimony, not only on the grounds of our objections already made, but on the additional ground that it is in the nature of cross-examination.

The Court: Not only that, but this specific item that counsel is now referring to is the one that was excluded by the Court. The objection is sustained.

Mr. Wood: That heading at the top of page 3 was excluded?

The Court: I remember you objected specifically to the different methods Crowe was supposed to have used, and the Court excluded them at your motion. My memory may be faulty on that, but I don't think it is. That being the case, I won't permit you to cross-examine on it.

(Testimony of Charles E. Rawlinson.)

Q. (By Mr. Wood): Mr. Rawlinson, your first audit on behalf of Interior as far as the period of time covered in this audit is concerned would be in the forefront of 1936, would it not?

A. Now you are again referring to two things. Do you refer to an annual examination when you—

Q. (Interrupting) That is right.

A. Our first annual examination covering this period would come in as at March 31, 1936.

Q. Some of these checks listed in your audit are dated 1935? A. Yes.

Q. As having been improperly withdrawn?

A. Yes. The examination was March 31, 1936; as of that date. [142]

Q. Why would not the audit of 1936 disclose checks that were cashed in 1935?

Mr. Jones: I object to that on the grounds of incompetency, irrelevancy, and immateriality. I further object to the way the question is put, and as calling for the conclusion of this witness on a point that is not even embraced within the scope of the duties that he had, as have been developed by the evidence; on the further ground that it is nothing except in the nature of cross-examination, which he went into yesterday.

The Court: What was the question, Mr. Reporter?

(The question was read by the Reporter.)

The Court: I don't think it makes any difference. He may answer. I think I know the answer.

(Testimony of Charles E. Rawlinson.)

Mr. Jones: Isn't there more to that question than that?

The Reporter: No.

A. The scope of the examination was such that it wouldn't necessarily come to light, the scope of the examination and the instructions of Balfour, Guthrie & Company and subsidiary companies.

The Court: I don't know that I understand that.

The Witness: The answer?

The Court: Yes.

A. The question was, why didn't this particular transaction that occurred in 1935 come to light in our examination at March 31, 1936. The scope of the examination of Balfour, Guthrie & Com- [143] pany and its subsidiary companies is not such that would necessarily disclose some individual relatively small defalcations in relation to the whole of the companies examined.

Q. (By Mr. Wood): Do you mean that your examination in '36 was rather a sketchy one of the Interior's affairs?

A. It was such an examination as might be made in relation to the subsidiary company of a group of companies to satisfy ourselves as to the substantial accuracy of the balance sheet of that subsidiary, which we did.

Q. Now when you made your annual examination and report in 1937 did your examination then disclose these forged checks for 1935 and 1936?

A. It did not.

(Testimony of Charles E. Rawlinson.)

Q. Why? A. The same remarks apply.

Q. Would your answer be the same with reference to your annual examination and report in 1938 as concerns the forged checks for '35, '36, and '37?

A. The answer would be the same with respect to the individual year. You are not implying from that question that possibly these matters of prior years would have developed and come to light in that latter year?

Q. I am not trying to imply anything, Mr. Rawlinson. I just want to see what kind of a check you did make in those years.

A. Well, the answer with respect to the transactions for the [144] year ending March 31, 1938 is the same as for the transactions ending March 31, 1937.

Q. None of these peculations were discovered during that time? A. They were not.

Q. Now prior to making this audit here, Pre-Trial Exhibit 3, did you make your annual investigation and report to Balfour, Guthrie and its subsidiaries?

A. No, it was at the commencement of our work in connection with our usual annual examination of Balfour, Guthrie & Company that this matter came to our attention.

Q. Which report did you get out first then, the one that is in evidence, Exhibit 3, or your annual examination and statement?

A. The report on Balfour, Guthrie and its subsidiaries would be after this date.

(Testimony of Charles E. Rawlinson.)

Q. Do you have a copy of that here with you?

A. No, that is in San Francisco.

The Court: Is this examination going to take very long? The Court is required to be on the bench again at one o'clock, so at this time I think I shall suspend for the present, and perhaps in view of that circumstance you had better have these exhibits taken out where you can work with them during that time. Take them into the library, and I will recess at this time.

Mr. Wood: Until two?

The Court: Until two.

(Thereupon, at 12:00 o'clock noon, March 27, 1941 a recess was taken until 2:45 o'clock P. M. of the same date.) [145]

Portland, Oregon, March 27, 1941.

2:45 o'clock P. M.

(After recess.)

Mr. Wood: Mr. Rawlinson, will you resume the stand, please?

CHARLES E. RAWLINSON

thereupon resumed the stand and testified further as follows:

Direct Examination

(Continued)

By Mr. Wood:

Q. During the time your company was auditing the books of the Interior—I mean the annual audits of '36, '7, and '8—did you at any time or your com-

(Testimony of Charles E. Rawlinson.)

pany at any time criticize or offer any suggestions to the Interior with reference to the manner in which its records and funds were handled?

Mr. Jaureguy: I object to that as incompetent, irrelevant and immaterial. Even assuming that there was any merit to their contention that there was improper handling, that is to be determined on the intrinsic merits of the system they had, and not what somebody told them.

The Court: The objection is sustained.

Q. (By Mr. Wood): As to these 19 checks which are missing, Exhibit 2 being a carbon of the face of those checks, when did you discover that the originals of those were destroyed?

A. At the time of the investigation in May, 1939.

Q. What is the difference between a balance sheet audit and a detailed yearly audit? [146]

A. A balance sheet audit is made for the purpose of determining the substantial accuracy of the items appearing on the balance sheet at a given time and to review the profit and loss account. There are various types of detailed audits. There is a detailed audit to determine the accuracy of all cash transactions for the year. There might be a detailed audit to establish the correctness of the capital assets accounts. The detailed audit might cover all of the transactions of the company, but that is always limited, because the transactions of the company—where do you stop? There isn't such a thing as a detailed audit on which two people could agree exactly.

(Testimony of Charles E. Rawlinson.)

Q. Which character of audit did your company furnish Balfour, Guthrie in the years I mentioned, '36, '7, and '8?

A. I believe it was a balance sheet audit.

Q. And in checking into the records of the Interior which character of audit was used?

A. It would be a balance sheet audit with such limitations in the scope as were arranged between the principals of the parent company and the partners of our firm.

Q. I was going to ask about that. Who limited the scope?

Mr. Jones: If the Court please, there is no duty on the part of any corporation in the State of Oregon to furnish any particular kind of an audit for the benefit of any bank. We object to this line of testimony as irrelevant, incompetent, and immaterial. [147]

The Court: He may answer.

Q. (By Mr. Wood): Do you remember the question?

A. May I have it read, please?

(The question was read by the reporter.)

A. I am not in a position to say.

Q. You don't remember whether they did or the Interior did?

A. I wouldn't know. The instructions on that would come from the officials of the parent company to the members of our firm in San Francisco.

Q. But it was a limited audit in each of those years?
A. Yes.

(Testimony of Charles E. Rawlinson.)

Q. Referring to Exhibit 19, the ledger of the Interior in evidence here, are you able to point out any direct entries made in that ledger without supporting vouchers or support by books of original entry as disclosed by your audit?

A. It would be practically impossible to put a finger on it by just turning over sheets.

Q. Does your audit disclose that there were some?

A. The audit disclosed there were some.

Q. Without supporting entries in original books?

A. Yes. There were very few of that particular type.

Q. I note down at the bottom of Schedule 4 of your audit an asterisk and then these words: "In these instances proper payment had been made to the employees in a combination of drafts, check and cash." [148]

A. I should like to have Pre-Trial Exhibit 3 placed before me. Is that on Schedule 3?

Q. Schedule 4. Do you find that language?

A. "In these instances proper payment had been made to the employee in a combination of drafts, check and cash." Just what was the exact question?

Q. I hadn't put the question. I asked you about that language in the audit—directed your attention to it. Now with your experience as a certified public accountant I ask you whether or not that isn't a system or method calculated to permit defalcations.

A. No.

(Testimony of Charles E. Rawlinson.)

Q. Wouldn't a system calling for a single check or single draft be better designed to prevent defalcation?

Mr. Jaureguy: I object to that on the ground that it is comparing two systems, and the question isn't whether some other system would be better, the question is, even assuming there is any merit to their contention, whether the system used was reasonably proper.

The Court: That is my opinion. This isn't a case where they are bound to use every device, care, and precaution, and under the circumstances the Court sustains the objection.

Q. (By Mr. Wood): When you discovered that duplicate payments were recorded on the books did you find any supporting entries in the case of each of them, that is, the one payment and the [149] duplicate payment,—did you find supporting entries in the book for both?

A. Yes, where there was a disbursement of money there would have to be an entry charging some expense account or payroll, as the case may be.

Q. Even in the case of duplicate payments, both would be supported by some—

A. (Interrupting): In some way they would have to get into the books. It might be that a combination of entries would take care of three checks, all of which were not material in themselves in amount.

Mr. Wood: That is all.

(Testimony of Charles E. Rawlinson.)

Cross-Examination

By Mr. Jones:

Q. Mr. Rawlinson, these various audits that you would make there always found the books of the Interior Warehouse in balance, did they not?

A. Yes.

Q. Did Balfour, Guthrie maintain a controlling account in its own organization under the Balfour, Guthrie books for the Interior Warehouse Company?

A. Yes, they had an inter-company controlling account.

Q. Did the balances as shown by your audits of the Interior Warehouse Company reconcile with the controlling accounts of Balfour, Guthrie? [150]

A. Yes.

Q. Did the records of the bank account maintained by the Interior Warehouse Company balance with those of the bank?

A. Yes, the bank account was brought—the book balance was brought into agreement or into reconciliation with the balance shown on the bank statement.

Q. Then for every debit that was made in any way there was a corresponding credit entered into the books, and always there was the contra item in all these entries?

A. Collectively. It was always placed in balance. For an adjustment of three debits there might be two credits balance it off, but the total of

(Testimony of Charles E. Rawlinson.)

those figures would always agree, the debit and the credit.

Q. Any time you listed the debits and listed the credits you always had a balance? A. Yes.

Q. Were these duplicate payments or forged checks that reflected themselves primarily in the payroll accounts of a quantity that made any marked difference in the cost of handling this grain, and so forth? Did they increase the cost to the point where the increase itself would challenge attention? A. No.

Q. Now, you said something on your direct examination about whether there were supporting entries in books of original entry for the ledger entries. Was there not in every case some supporting [151] document like an altered payroll or something that covered these?

A. No, there were two or three instances where a direct entry had been made in the ledger.

Q. Without even a——

A. (Interrupting): Without anything at all. An entry of that type would be extremely difficult to detect, particularly unless you made a detailed check of the transactions and ran onto the fact that there was no supporting evidence. For example, if you charged an account with \$75 in an expense account which would cover up \$75 taken out of the bank account, unless you happened to check that particular transaction it wouldn't come to the attention of anybody in particular. The company

(Testimony of Charles E. Rawlinson.)

wouldn't notice it in their review of the expense accounts.

Q. But for the most part there was some supporting document of some nature or some original entry that supported every ledger entry, was there not? A. Yes.

Mr. Jones: I think that is all.

The Witness: That question might take some elaboration on these 19 checks. You mentioned the words "some supporting evidence." I don't want there to be any misunderstanding. You were asking me if there was a direct entry in the ledger. Now you go back to support a transaction, and somewhere there is a stopping point. The entry in that ledger came from another book, which would be in this case the journal, or it might come from [152] the payroll summary. That payroll summary might not have some support.

Mr. Jones: That is all.

Mr. Wood: That is all, Mr. Rawlinson.

(Witness excused.) [153]

R. G. GRIFFIS

was thereupon recalled as a witness in behalf of the defendant herein, and testified further as follows:

Direct Examination

Mr. Wood: Mr. Norman, will you hand Mr.

(Testimony of R. G. Griffis.)

Griffis the audit—that is No. 3—and the dock time book—that is 23?

Q. (By Mr. Wood): Do you have the dock superintendent's time record?

A. The time book or the payroll?

Q. The time book. That is 23. Now Mr. Griffis, referring to the audit, Exhibit 3, particularly Schedule 1—

A. (Interrupting): What schedule is that?

Q. Schedule No. 1 under Exhibit A. Did you during the noon recess and at my request check those 21 checks first listed on Schedule 1 by number, and so on, against the original dock time book, Exhibit 23? A. Yes.

Q. How many of those 21 checks first listed on Schedule 1 did you find also listed in Exhibit 23, the dock time book?

Mr. Jaureguy: We want to make the same objection that we made before with respect to the time books, and that is, that there is no duty on the part of the depositor to compare checks with time books or to refer to these time books at all to determine whether or not the checks were all proper. It is incompetent, irrelevant, and immaterial. [154]

Mr. Wood: Those time books are the original source of the actual time itself, and I propose to show by the witness that with the exception of three out of that group none of those checks appear listed there at all.

The Court: He may answer.

(Testimony of R. G. Griffis.)

Mr. Wood: Read the question to Mr. Griffis, please.

The Court: But the Court isn't to be construed as ruling as to what the theory of the matter is except to explain the account. There is this account and the audit, and I think he has a right to put in the supporting documents and ask questions about the supporting documents.

Mr. Jaureguy: But his contention is that there is embezzlement here, which we contend did happen.

The Court: Well, if he proves your case——

Mr. Jaureguy (Interrupting): I am not casting any aspersions on him, but when he says he is trying to prove that these checks were issued to men for services they have not performed he is trying to prove the very thing that we are contending, and we can agree that that is the fact; we don't have to go to any books for it. If he was offering it for the purpose your Honor suggests, of attacking the accuracy of our audit, he is doing just exactly the opposite, to show that the audit means what we say it does, and therefore he is not offering it for any proper or admissible purpose.

The Court: Well, I think if he is proving your case for you [155] you have no objection. He may answer.

Mr. Wood: Will you read the question to Mr. Griffis?

(The question was read by the reporter.)

(Testimony of R. G. Griffis.)

A. There were three that—well, there was only one that was entered in the time book.

Q. (By Mr. Wood): Which one was that?

A. That is C. Clarkson on February 24, 1939.

Q. That is check No. 4653? A. Yes.

Q. That is the only one that you found entered out of those 21 in the dock timebook?

A. Yes, that appeared on the timebook.

Q. Now, look down below on Schedule 1 to those 12 checks listed there and let me know how many out of those 12 you found listed in the dock timebook, Exhibit 23.

A. There were two.

Q. Which ones were they, Mr. Griffis?

A. B. Stewart, Check 713 on June 24, 1937, and C. W. Carey on October 21, 1937, Check 1344.

Q. Those are the only two out of those 12 that you found on the dock timebook?

A. That is right.

Q. Now, you will note on the audit here the amount of C. W. Carey's check, No. 1344, was given as \$34.38. A. Yes. [156]

Q. What amount did you find that listed at in the dock timebook?

A. That was \$14.58.

Q. Now, referring to the other check you found listed on the dock timebook, No. 713 to B. Stewart, you note the audit lists that as \$30.94.

A. It was \$1.98.

Q. In the dock timebook? A. Yes.

(Testimony of R. G. Griffis.)

Q. Now, refer in the audit to the 37 checks listed there on Schedule 3.

A. Yes.

Q. And will you also refer to Exhibit 34, the duplicate payroll in the country, and the original payroll in the country, Exhibit 21, and let me know how many of those checks that are numbered on Schedule 3 of the audit appear upon the original country payroll sheets, Exhibit 21?

Mr. Jaureguy: We want to make the same objection that we made to the last series of questions respecting timebooks on the ground that there was no duty owed by the depositor to the bank to make any comparison between original payrolls and duplicate payrolls, or between duplicate payrolls and checks.

The Court: The Court admits the evidence, not on the assumption that there is any such duty, but because this whole account has been placed in here and it is still a question as to what the duty of the bank was under the circumstances. You may [157] answer.

Mr. Wood: Will you read the question?

(The question was read by the reporter.)

A. None of these check numbers appear on the payroll.

Q. (By Mr. Wood): Now, let me ask you, referring again to Schedule 3 of the audit, the 37 checks that are listed there, how many, if any, of those did you find listed on the duplicate payroll for the country, Exhibit 34?

(Testimony of R. G. Griffis.)

A. None of the check numbers.

Q. I believe you already stated that on the country payroll no timebook was kept.

A. Yes, to my knowledge. I haven't been out in the country.

Q. The carbons of the payroll sheets were the original time records out there?

A. Well, I haven't been out in the country. I wouldn't know.

Mr. Wood: You may cross-examine.

Cross-Examination

By Mr. Jones:

Q. When you say that there were no numbers on your carbon copies of the country payrolls you are referring to check numbers, aren't you?

A. That is right.

Q. And the check numbers were not put on the payrolls until after the checks were issued, were they? A. No. [158]

Q. And the only payroll that was at the office at the time the checks were issued was the original?

A. That is right.

Q. And that would be the place where the numbers were put. A. Yes.

Q. Now, look at the original payroll and see if these check numbers on Schedule 3 don't appear on the original payroll.

A. No, there is no check number appears on the payroll.

Q. Even on the country payroll?

(Testimony of R. G. Griffis.)

A. No, the amounts appear, but no check numbers.

Q. You have them on the dock payroll, do you not?

A. I don't know. If you will let me examine it I will tell you.

Q. Yes, look at it.

A. No, the check numbers don't appear on that either.

Q. What is that?

A. The check numbers were inserted at the time of the audit.

Q. Well, are there numbers on the country payrolls that were inserted at the time of the audit?

A. Yes.

Q. Well, that is the point. There were numbers on the country payrolls, but they were put on subsequent to the issuance of the check?

A. Yes.

Q. That is what I had in mind. Of course those checks were all issued from Portland, weren't they? [159]

A. Yes.

Q. And the carbon copy was up in the country when the checks were issued?

A. Yes.

Q. There was some statement that you made on direct examination that I didn't get the full import of with respect to Schedule 3, when you said that none of this was on the payroll. Now what did you mean by that statement?

A. I said none of the check numbers.

(Testimony of R. G. Griffis.)

Q. You were just referring to the numbers?

A. I said "check numbers."

Q. O. K. On Schedule 1—do you have Schedule 1 right there? A. Yes.

Q. We are talking about Schedule 1 of Exhibit No. 3. Your testimony in connection with this group of checks in Schedule 1 was based on your dock timebook, wasn't it?

A. Yes.

Q. In the dock timebook during the months when Price, Waterhouse would be doing their auditing in 1938 and '9 names of people who had been inserted on the dock payroll originals were also inserted in the timebooks, weren't they?

A. Well, they are erased now; it appears that they were. The writing does not appear there now on the timebook.

Q. From what is left there it is apparent that they were there once? [160]

A. Yes, upon scrutiny you can tell that they were there.

Q. Those entries then were made in the timebooks so that the timebooks would bear some information that had been inserted into the payroll for the same persons?

Mr. Wood: I didn't get that question.

The Court: Read the question.

(The question was read by the reporter.)

Q. (By Mr. Jones): In other words the timebooks had been made to harmonize with the changes in the payrolls? A. Yes.

(Testimony of R. G. Griffis.)

Mr. Jones: That is all. Thank you.

Redirect Examination

By Mr. Wood:

Q. Now, referring again, Mr. Griffis, to Schedule 3 in the audit, the checks listed there by name, numbers, dates, and amounts, do any of those checks there listed now or did they at any time appear upon either the originals or the carbons of the country payroll sheets, or upon anything else?

A. Not the check numbers.

Q. Not those particular checks that are listed?

A. Not those check numbers.

Q. And the same is true of the 21 checks and the 12 checks listed on Schedule 1 as far as the dock superintendent's time record is concerned, with the three exceptions noted by you in your testimony? [161]

A. Now, wait a minute. On Schedule 1 are we talking about check numbers again, or names?

Q. We are talking about the checks represented on Schedule 1.

Mr. Jaureguy: I want to object to that question. He said that several times—not intentionally so, but he would ask about checks, and the answer as subsequently developed would indicate that the witness was thinking of check numbers.

The Court: The witness is expressly testifying about check numbers; he isn't making any reference to anything else.

(Testimony of R. G. Griffis.)

Q. (By Mr. Wood): Look at Schedule 1 again. That first lists 21 checks? A. That is right.

Q. Now in connection with the superintendent's timebook, do any of those names—

A. (Interrupting): That is right. When we are talking about Schedule 1 we are talking about names.

Q. How about names as against the dock superintendent's timebook?

A. There was one.

Q. That was the one that you mentioned, C. Clarkson, for \$42? A. Yes.

Q. And the rest do not appear? Is that right?

A. That is right.

Q. And then as to the 12 checks at the bottom of Schedule 1, you said that two of them did appear—the names did appear [162] on the dock superintendent's timebook?

A. That is right.

Q. The one for C. W. Carey for \$34.38, which on the timebook appeared to be \$14.58?

A. That is right.

Q. And the one to B. Stewart for \$30.94, which on the timebook was \$1.98? A. Yes.

Q. Has the superintendent's timebook been made to conform at any time or does it now conform with the names and the amounts listed on Schedule 1?

A. Well, in this one case—no, they were raised.

Q. Is that the erasure you spoke about?

(Testimony of R. G. Griffis.)

A. The name had been erased.

Q. But with that one exception of these 21 and 12, which would be 33 checks, the timebook at no time did and does not now correspond with this Schedule 1?

A. There are two erasures.

Q. What is the other one?

A. C. W. Clark on March 11, 1938, and C. Warren on April 21, 1939.

Q. All right. Out of these 33 checks listed on Schedule 1 those two that you mentioned are the only ones which do appear at the present time upon the original dock payroll book?

A. Those two. The names have been erased.

[163]

Q. But they did at one time?

A. It appears that they have.

Q. And with that exception have any of the others on Schedule 1 appeared?

A. Yes, C. Clarkson on February 24th was entered and is still there.

Q. With those three exceptions, the two erasures and the one that is still there, have any of the names or checks or amounts listed on Schedule 1 ever been put upon the original superintendent's timebook?

A. No.

Mr. Wood: That is all.

Mr. Jones: May I see the timebook?

(The timebook was handed to Mr. Jones.)

(Testimony of R. G. Griffis.)

Recross Examination

By Mr. Jones:

Q. Whose writing is on the top of these little pink inserts? A. I don't know.

Q. Do you know the month that the check was made for in making the audit, the Price, Waterhouse test check for one month of the bank reconciliations? Aren't you on a calendar year basis?

A. No, March 31.

Q. Well, for the year ending March 31, 1939, what month would a test check for?

A. Probably March, 1939. [164]

Q. The last month? A. Yes.

Q. Then the February 24th check which you testified to on Schedule 1, the 2nd item, the Clarkson check, would be the only one that they would have to take care of the timebook on in order to correspond with the payroll, wouldn't it, as far as test checking is concerned?

A. February 24th?

Q. Yes. You see, there is none in March, '39.

A. No. There is one for April.

Q. Well, they took care of both April and February then? A. It appears that way.

Q. That will take care of the test check for '39. Now go to '38. What month did they test check for in '38?

A. I don't know. There is an erasure on March 11, 1938.

Q. I am making a check mark on the third line

(Testimony of R. G. Griffis.)

of the March 24th page here that is open, on the third line from the top. Now if you will notice, there is an erasure mark there. A. Yes.

Q. That is for the March 24th payroll, isn't it?

A. Yes.

Q. Dock. And the first initial shows as an "L", doesn't it? A. Yes.

Q. That could very well be the L. G. Cross that is right above the "C. W. Clark" that you mentioned on March 11th of Schedule 1? [165]

Mr. Wood: I object to that as calling for a conclusion of this witness, not being proper cross-examination, and a matter for the Court to determine.

The Court: Read me the question.

(The question was read by the reporter.)

The Court: The objection is sustained.

Q. (By Mr. Jones): Now, you have already testified about erasure marks and whose names they were there. I wish you to state if you can from your other records whose name was once inserted there at that erasure mark.

A. At this one (indicating)?

Q. Yes, that one that I just called out.

A. It could be L. G. Cross.

Q. And that would take care of fixing the time-book for the 1938 year as far as these checks are concerned, wouldn't it?

Mr. Wood: This witness has said, your Honor, he doesn't know what month the checks were made.

(Testimony of R. G. Griffis.)

A. I don't know what month the check was made. I wouldn't know.

Mr. Jones: Let it go.

The Court: Yes, I think if that is true the Court can answer that question just as well as the witness.

Mr. Jones: Please?

The Court: I say, I think if that would be true the Court could answer that question just as well as the witness.

Mr. Jones: Let it go. That is all. [166]

The Court: As a matter of fact, I shouldn't be surprised but what my inference and deduction would be more accurate.

Mr. Wood: That is all, Mr. Griffis.

(Witness excused.) [167]

G. L. CROWE

was thereupon recalled as a witness in behalf of the defendant herein, and testified further as follows:

Direct Examination

Q. Mr. Crowe, did your duties as an employee of the Interior include the duty to examine paid checks and notice the endorsements on the back that were returned from the bank?

Mr. Jaureguy: I object to that as calling for a conclusion of the witness.

(Testimony of G. L. Crowe.)

The Court: I didn't catch the exact phrasing. Will you read me the question?

(The question was read by the reporter.)

The Court: He may answer.

Mr. Jaureguy: Pardon me if I extend my objection a little further, your Honor.

The Court: Yes.

Mr. Jaureguy: On the further ground that notice to Crowe would not be notice to the Interior Warehouse Company, and therefore it could not be offered for that purpose.

The Court: I am not so sure about that. That is one of the questions that I will have to make up my mind about. I am going to let him answer the question, though.

Mr. Jaureguy: I take it, then that in overruling the objection you are not passing on that question.

The Court: I am not passing on that question. [168]

Mr. Wood: Do you wish the question read again, Mr. Crowe?

The Witness: Please.

(The question was read by the reporter.)

A. Yes, but I would like to elaborate on that question.

Mr. Wood: Explain it.

The Court: Make any explanation you wish.

The Witness: I scrutinized the endorsements on the returned checks for the express purpose of ascertaining that the fictitious checks had been returned

(Testimony of G. L. Crowe.)

from the bank, not for determining the validity of the other endorsements, the endorsements on the other checks.

The Court: The question was whether it was your duty.

A. It was my duty, yes.

Q. (By Mr. Wood): Of course as to the 126 checks involved here you knew that on each and every one of them it was a forged endorsement of the payee?

A. Yes.

Mr. Wood: Mr. Norman, will you kindly hand the witness Exhibit 24?

Q. Will you open the cover, please. Those have been identified as the Bank of California's statements to the Interior for the period of time embraced in this lawsuit. Was it part of your duty each month to obtain the bank statement from the bank?

A. Yes, sir.

Q. For the month of September, 1935 when would you obtain that [169] bank statement? About what time?

A. October 1st.

Q. And that would apply as to all of the bank statements which are in that box marked as Exhibit 24, that is, respectively? Each month it would operate that same way?

A. Yes, they would be obtained on the first of the following month.

Q. And you did in fact obtain those each of the following months?

A. With the exception of March 31st, which would be obtained by the auditors.

(Testimony of G. L. Crowe.)

Q. March 31st of 1939?

A. All years.

Q. Oh, each year? A. Yes.

Q. And with those exceptions you each month took delivery of those bank statements?

A. Yes, sir.

Q. And of the canceled checks represented by those bank statements? A. Yes, sir.

Q. Did you have a desk in Balfour, Guthrie's office, or did the Interior have a separate office?

A. No, I did have a desk in the office.

Q. A desk in Balfour, Guthrie's office?

A. Yes.

Q. There wasn't any separate office that you had for the Interior, [170] was there? A. No.

Q. Was there any separate office maintained for the Interior at all in Portland? A. No, sir.

Q. Except for these annual audits and the investigation in May of 1939 was your work in making up the payroll, having the girl make up the checks under your direction, taking them to the proper officers for signatures, taking them back for distribution, or any of your bookkeeping or documentary entries checked by any official, officer, or employee of the Interior?

Mr. Jaureguy: I object to that as incompetent, irrelevant, and immaterial. There is no duty on the part of the Interior to the defendant in this case to do any such checking.

The Court: I will allow him to answer.

(Testimony of G. L. Crowe.)

The Witness: Read the question again, please.

(The question was read by the reporter.)

A. Yes.

Q. (By Mr. Wood): What is that?

A. Yes, sir.

Q. By whom?

A. By either Mr. Lawson or Mr. Chrystall.

Q. How often was this check made?

A. That would be at their discretion. I had no way of determining how often they did check. As I would take the checks and payroll to them for signature it was at their discretion to check. [171]

Q. Was that as far as their check went, checks against the payroll?

Mr. Jaureguy: I object to that as calling for something not within the knowledge of the witness.

Q. (By Mr. Wood): As far as you know how much of a check was made by these gentlemen?

A. Just what I have stated.

Q. That is, checks against the payroll? Is that right?

A. Yes.

Q. Did you also work for Balfour, Guthrie as well as working for the Interior?

A. I was not an employee of the Interior.

Q. You were not an employee of the Interior?

A. No.

Q. By whom were you paid?

A. Balfour, Guthrie & Company.

Q. Entirely? A. Entirely.

(Testimony of G. L. Crowe.)

Q. Well, you did do this work for the Interior that you told about yesterday and today?

A. I worked on the books of the Interior Warehouse Company for Balfour, Guthrie & Company.

Mr. Jaureguy: I am sorry; I didn't get that.

The Court: Read the answer.

(The answer was read by the reporter.) [172]

Q. (By Mr. Wood): Did that work absorb all of your time? A. No, sir.

Q. Did it absorb the major portion or the minor portion of your time?

A. The minor portion.

Q. Most of your time was spent working for Balfour, Guthrie? A. Yes, sir.

Q. How much time each day approximately on an average would that be on the Interior records?

A. Over a period of thirty days, should I say?

Q. That will be all right.

A. One hour a day.

Q. And how long were your working days?

A. Seven hours.

Mr. Wood: You may cross-examine.

Cross-Examination

By Mr. Jones:

Q. All of the Portland people who worked in some way in connection with the Interior Warehouse Company were on the Balfour, Guthrie payroll rather than the Interior Warehouse, were they not? A. No, sir.

(Testimony of G. L. Crowe.)

Q. Were there some on the Interior Warehouse Company here in Portland?

A. Here in Portland? [173]

Q. In the main office. Do you know?

A. Yes, I know.

Q. Well, isn't it so that the office people down in the main office here by the Telephone Building down there where they have their head office—that the Portland employees in that office were paid by Balfour, Guthrie and were primarily Balfour, Guthrie employees?

A. I will have to ask a counter-question before I can answer that.

Q. What is that?

A. I will have to ask a counter-question before I can answer that.

Q. O. K.

A. Would you consider an officer of the company an employee?

Q. Yes, all of them, officers and employees and everybody else. They were all paid by Balfour, Guthrie, were they not?

A. No.

Q. Who was not?

A. The president of the company.

Q. The President of the Interior Warehouse?

A. Yes.

Q. He was on the Interior Warehouse payrolls?

A. He was paid by the Interior Warehouse Company.

Q. But the rest of them like Mr. Lawson and Mr. Chrystall were paid by Balfour, Guthrie? [174]

(Testimony of G. L. Crowe.)

A. Balfour, Guthrie employees, yes, sir.

The Court: I would like to have that situation a little further developed. I don't know whether I should take any hand in this and develop it myself. Are you drawing any distinction between the fact that this man was paid by Balfour, Guthrie as indicating that he wasn't performing his duties or didn't have any responsibility for the Interior?

Mr. Jones: No, we just followed it up because they had brought out that one exception, and I wanted to say—and am I not right in this—that the laboring men that worked for the Interior Warehouse Company like people handling grain in the country and the dock employees were all Interior Warehouse Company employees?

A. That is right.

Q. But for the most part the office crew in Portland, even though some of their time was devoted to Interior Warehouse Company work, was on the Balfour, Guthrie payroll? A. Very true.

Q. But working for Balfour, Guthrie, some of your duties were for the Interior Warehouse?

A. Yes.

The Court: I take it then that there is no claim on anyone's part that the duties that he performed were not duties for the Interior and responsibilities for the Interior?

Mr. Jones: Oh, no. [175] ..

The Court: All right.

Q. (By Mr. Jones): Now with reference to

(Testimony of G. L. Crowe.)

this reconciling of the bank balances, it was your duty when the bank statements and canceled checks were turned over to you on the first of the month for the preceding month to determine whether your books agreed with the bank's as far as money on hand was concerned? A. Yes.

Q. It also was part of your duty at the time to determine how many checks were still outstanding?

A. Yes.

Q. And then when you turned them over, if you did turn them over and look at the endorsements, it was merely to see as far as the valid checks were concerned that there was an endorsement by the payee, but you made no attempt to determine whether that was a bona fide endorsement or not?

A. No.

Q. And what you said about looking for spurious checks in here, or fictitious checks, as I think you called them, that was something that you were doing for yourself and not for the Interior Warehouse Company? A. That is right.

Q. You had no further duties as far as the Interior Warehouse Company was concerned in reconciling your bank account than merely to see that your books and the bank statement reconciled [176] and were the same? A. Yes.

Q. And to determine the number of outstanding checks? A. That was all.

Q. When you had done those two things, that is, reconciled your balances and determined the out-

(Testimony of G. L. Crowe.)

standing checks, your duties with reference to reconciliation as far as the Interior Warehouse Company was concerned were over? A. Yes.

Q. Now I believe that there was some testimony either this time or on your prior statements to the effect that part of the time you didn't get the payroll. By that you meant at the month of the annual audit? They went right to the auditors—I mean the bank statements—is that correct?

A. That is true.

Q. Then you got them eleven months out of the year and the auditors got them the test month?

A. Yes.

Q. It was only the test month then that you were particularly concerned about? A. Yes.

Q. You made no attempt to put in names then except for the test month?

A. That was all.

Mr. Jones: That is all. [177]

Redirect Examination

By Mr. Wood:

Q. But after the auditors received the bank statement for the one month in each year then it was lodged in your hands, was it not?

A. Yes.

Q. You had charge of all the bank statements?

A. Yes.

Q. Whether you got them initially yourself or whether the auditors got them that one month in each year?

(Testimony of G. L. Crowe.)

A. Yes, they were in my custody.

Q. Part of your duties consisted of reconciling the accounts from the bank statements? That was part of your work? A. Yes.

Q. Did you make all the deposits for the benefit and credit of the Interior?

A. No, I made no deposits.

Q. You made no deposits at all? A. No.

Q. You had no occasion to take checks for Balfour, Guthrie or checks made out to the Interior for deposit? A. No.

Q. Wasn't it done under your direction, that the checks were stamped with the Interior's endorsement?

A. No, I would merely request the deposit, but I would never [178] see the check.

Q. You would merely do what?

A. Request the deposit.

Q. But you wouldn't see the check?

A. No, sir.

Q. Somebody else would take care of that?

A. Yes.

Mr. Wood. That is all.

Mr. Jones: Along that line I will have to ask a few questions.

Recross-Examination

By Mr. Jones:

Q. Balfour, Guthrie & Company were substantially the treasurer for the Interior Warehouse Company, weren't they? A. Yes.

(Testimony of G. L. Crowe.)

Q. Now while your general ledger, and so forth, would show the earnings of the Interior Warehouse Company and you could determine at the end of a period of time what the earnings of the Interior Warehouse Company were, it didn't actually receive the money and handle the money itself? It had what was substantially a revolving fund, didn't it? A. Yes.

Q. The money from the warehouse receipts, that is, from storage charges, and so forth, would be paid directly to Balfour, Guthrie or endorsed over by the Interior Warehouse to Balfour, Guthrie?

[179]

A. Yes, that is true.

Q. And Balfour, Guthrie would deposit those funds in its own account, wouldn't it?

A. Yes.

Q. And all the funds in the bank that you ever maintained was a revolving fund of five or six hundred dollars for paying payroll checks?

A. Yes, sir.

Q. And maybe an insurance policy or something once in a while? A. Yes.

Q. Now then, when you needed money to cover your payroll and cover your expenses, when you needed money for that purpose you requisitioned it from Balfour, Guthrie's bank account, didn't you, or from Balfour, Guthrie? A. Yes.

Q. And then you told them, "My expenses today are going to amount to so much. I want enough money to cover checks for that sum"?

(Testimony of G. L. Crowe.)

A. Yes.

Mr. Jones: That is all.

Mr. Wood: That is all, Mr. Crowe.

The Court: Just a moment. Assuming that there was a check on which the name of Mr. Lawson, for instance, was forged, whose duty would it be to find that when the check was returned from the bank? [180]

A. That would be my duty.

The Court: Any cross-examination?

Mr. Jaureguy: I am sorry, I couldn't hear the question.

Mr. Jones: I didn't hear the question.

The Court: The question was, suppose the name of Mr. Lawson was forged on one of the checks and that check was returned by the bank, whose duty would it be to catch that, and the witness said it would be his duty. Do you desire to cross-examine on that?

(The attorneys for the plaintiffs conferred.)

Mr. Wood: I take it that I am not to call another witness. They haven't decided yet.

The Court: No, I want to clear this up first to see whether counsel has any cross-examination.

Mr. Jones: Just one moment.

The Court: Yes, surely.

(The attorneys for the plaintiffs conferred further.)

Q. (By Mr. Jones): You have been telling us about your duties, Mr. Crowe. How did you find out those duties?

(Testimony of G. L. Crowe.)

A. I was instructed in my duties by Mr. Lawson.

Q. Did Mr. Lawson at any time ever direct your attention to the possibility that there would be a forgery of either his name or Mr. Chrystall's or Mr. MacGregor's or Mr. Dickson's, the only people that signed checks, and direct your attention particularly to be on the alert for that? [181]

A. No.

Mr. Jones: That is all.

Mr. Wood: That is all, Mr. Crowe.

(Witness excused.) [182]

J. B. W. LAWSON

was thereupon recalled as a witness in behalf of the defendant herein, and testified further as follows:

Direct Examination

By Mr. Wood:

Q. Mr. Lawson, when was the Interior organized? A. I think it was 1900.

Q. Was this present system that is used now—or was used up to May of '39—put in when the corporation was organized?

A. It has been developed, but it is practically the same system.

Q. Did you or to your knowledge any other officer or employee of the Interior, with the exception

(Testimony of J. B. W. Lawson.)

of Price, Waterhouse, ever make any check or inspection of Mr. Crowe's work?

Mr. Jaureguy: I want to make the same objection that I made to the same question to Mr. Crowe, on the ground that there is no duty owed to the bank to make any check of the books.

The Court: With reference to that theory the Court believes that this is competent. It is an explanation of the whole situation. He may answer.

A. A trial balance was taken off by Crowe every month and shown to the bookkeeper of Balfour, Guthrie & Company to check the control in Balfour, Guthrie's books.

Q. That was Crowe's own trial balance?

A. Yes. _____

Q. Was any check made back against that to see that it was proper? [183] A. No.

Q. Then with that one exception of this document furnished by Crowe, the trial balance, and the audits by Price, Waterhouse, and in addition the fact that you had the payroll checks and the payroll as you signed checks, you and Mr. Chrystall, was there to your knowledge any check or inspection of Crowe's work at any time during the period of his employ?

A. The only thing would be collaboration of those items.

Q. During that period of time did you ever notice any alterations in these pay sheets?

A. No.

(Testimony of J. B. W. Lawson.)

Q. You know now that there are some? Do you know that now?

A. From the evidence, yes.

Q. Did you ever require him to use indelible pencil or stylus ink on any of those records or pay sheets?

A. There were no instructions given on that point.

Q. You knew they were doing it in pencil, did you not?

A. I think indelible, for the dock at least.

Q. I imagine the other question answers it, but you had no occasion to check into these paid checks as they came back from the bank? A. No.

Q. And as far as you know did anyone else besides Crowe do that?

A. Do you mean the returned checks from the bank?

Q. Reconciling them. [184]

A. He reconciled them.

Q. Did anyone else do it to your knowledge?

A. I think it may have been done by someone else, but how often I couldn't say now.

Q. Was that part of his duties as an employee of the Interior? A. Yes.

Q. Did he ever call to your attention any irregular or improper checks during the period of his employ? A. No.

Q. Do you know who may have written "void" on those carbon copies of the lost checks? That is

(Testimony of J. B. W. Lawson.)

Exhibit 2. Such of them that have the word "void" on there, do you know who wrote that on?

A. I don't know.

Q. As I understand it, out in the country there were no timebooks such as the superintendent's dock book kept here.

A. Well, I don't know about that. I couldn't testify on that. There must have been some kind of a record of the agents.

Q. Wasn't there a carbon, that is, a duplicate original of the timebook sheet? Didn't that correspond with the timebook? A. I don't know.

Q. Yesterday I think you testified that as you signed checks that you would check them against the payroll sheets. Is that right?

A. That is right.

Q. Did you at any time during Crowe's employ check the pay- [185] roll sheets on the dock against the superintendent's timebook?

Mr. Jones: The same objection, on the ground that we owed no duty to do that, and it is incompetent, irrelevant, and immaterial.

The Court: The Court overrules the objection on the same basis as heretofore stated.

Q. (By Mr. Wood): Did you do that?

A. What was the question, please?

Mr. Wood: Will you read it, Mr. Reporter?

(The question was read by the reporter.)

A. No.

Q. Did any officer or employee of the Interior ever do it to your knowledge?

(Testimony of J. B. W. Lawson.)

Mr. Jones: Same objection.

The Court: Same ruling.

A. I don't think so.

Q. (By Mr. Wood): Did anyone to your knowledge in the employ of the Interior ever check the paid checks against the superintendent's time-book?

Mr. Jones: Same objection.

The Court: Same ruling.

A. I don't think so.

Q. (By Mr. Wood): Did anyone in the employ of the Interior during the time covered by Crowe's employ ever check the paid country checks against the carbon copies of the payroll? [186]

Mr. Jones: Same objection.

The Court: Same ruling.

A. No.

Mr. Wood: You may cross-examine.

Cross-Examination

By Mr. Jones:

Q. Until this course of defalcation was brought out in May of 1939 was there anything that occurred that ever made you suspicious of the actions or conduct of Mr. Crowe? A. No.

Q. During the years from 1900, when you said the warehouse company was organized, down to this occasion, had there been any other defalcations of any kind? A. None.

Mr. Wood: I object to that as immaterial, and move to strike the answer.

(Testimony of J. B. W. Lawson.)

The Court: Overruled.

Q. (By Mr. Jones): Did Mr. Crowe come to you people with good recommendations?

A. Yes.

Mr. Jones: That is all.

Mr. Wood: That is all, Mr. Lawson.

(Witness excused.) [187]

A. M. CHRYSTALL

was thereupon recalled as a witness in behalf of the defendant, and testified further as follows:

Direct Examination

By Mr. Wood:

Q. Mr. Chrystall, do you know who marked as void on such of Exhibit 2 as may have been marked void? A. No.

Q. Do you know that it was Mr. Crowe's duty to reconcile the bank statement each month of the Interior? A. I believe it was, yes.

Q. When he would present checks to you for signature would he also furnish you with the original payroll sheet? A. Yes.

Q. And as you signed checks did you check the checks back against that sheet?

A. Yes, and count them up to see the number of checks.

Q. But in addition to the number against num-

(Testimony of A. M. Chrystall.)

ber, would you also check the amount and the dates and names? A. Not the dates.

Q. Would you check the names?

A. Yes.

Q. And then would you total up the number of checks against the total of the names appearing on the payroll sheets? A. Yes.

Q. Did you or any other officer or employee of the Interior to [188] your knowledge during the period covered by Crowe's employ ever check those payroll sheets against the dock superintendent's timebook?

Mr. Jones: The same objection.

The Court: Same ruling.

Q. (By Mr. Wood): Did you ever make that check, or any other employee of the Interior to your knowledge?

A. I can only talk for myself. I didn't.

Q. Did the same thing apply to the checking of the checks against the superintendent's original timebook?

Mr. Jones: Same objection.

The Court: Same ruling.

The Witness: What was the question?

Q. (By Mr. Wood) Would you give the same answer or would you wish to give a different answer to a checking of the paid checks against the superintendent's timebook?

A. No, I didn't check them.

(Testimony of A. M. Chrystall.)

Q. Do you know of anybody in the employ of the Interior who did?

A. I don't know.

Q. Did you or anyone in the employ of the Interior to your knowledge during the time of Crowe's employ ever check the paid checks back against the country payroll carbons?

Mr. Jaureguy: Same objection.

The Court: Same ruling.

Q. (By Mr. Wood) Did you ever do that? [189]

A. You mean the carbons they had in Portland or the carbons they had in the country?

Q. Any carbon of payroll sheets. A. No.

Q. Did anyone to your knowledge ever make a check?

A. I don't know.

Mr. Jones: We want the objection to go to that last question too.

The Court: The ruling is the same.

Q. (By Mr. Wood) Do you know whether or not the original payroll books as distinguished from sheets—the original timebooks as distinguished from payroll sheets—were kept out in the country?

A. The agents have a method of keeping track of the work performed in each warehouse.

Q. Isn't that the payroll sheets? Isn't that the record?

A. No, that is the payroll. They make up their payroll from this record.

Q. And that record is similar to the dock superintendent's timebook, is it?

(Testimony of A. M. Chrystall.)

A. Not necessarily, no.

Q. But they do have an original record?

A. They have to have some record of the time spent, naturally.

Q. Did you or anyone else in the employ or representing the Interior at any time during the period of Crowe's employ ever [190] check the country payroll sheets, the originals, against these records that you now speak of?

Mr. Jones: Same objection.

The Court: Same ruling.

A. I didn't.

Q. (By Mr. Wood) Do you know if anyone else did? A. I don't know.

Q. Did anyone except Mr. Crowe reconcile these bank statements and inspect these canceled checks?

A. I couldn't tell you that.

Q. Did you ever do it at any time?

A. No, that is not my job.

Q. Do you know that it was part of his job?

A. I am not acquainted with what he had to do, no.

Mr. Wood: You may cross-examine.

Mr. Jones: No cross-examination.

Mr. Wood: That is all.

(Witness excused.) [191]

E. F. MUNLY

was thereupon produced as a witness in behalf of the defendant herein, and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Wood:

Q. Your name is E. L. Munly? A. E. F.

Q. E. F. Munly. I beg your pardon. What is your position with the Bank of California, Mr. Munly? A. Assistant manager.

Q. That is at which branch?

A. At the Portland branch.

Q. How long have you had that position?

A. About three years.

Q. And were you with the bank before that?

A. Yes.

A. Also in the same branch? A. Yes.

Q. In what capacity?

A. Just prior to that I was auditor for about ten years.

Q. And you are still in the bank's employ?

A. Yes.

Q. As an officer, assistant manager? A. Yes.

Q. Are you able to tell the Court over the period from September 1, 1935 to May 2, 1939 approximately the number of checks that [192] would be cleared through the bank each day in the way of paying those checks?

Mr. Jones: I object to that as incompetent, irrelevant, immaterial, and in no way bearing upon any of the issues of this case.

(Testimony of E. F. Munly.)

The Court: He may answer.

A. Well, of course during that period we have increased our business, so now there is more than there was the first part of that period, but right at the present time there is between eight and ten thousand checks that go through a day.

Q. (By Mr. Wood) How does that compare with the daily number of checks in the period I mentioned? Was it somewhat less at that time?

A. Perhaps a little less.

Mr. Jones: The same objection.

Q. (By Mr. Wood) Is it the custom of the bank now, or has it ever been, when a check is presented to it purportedly endorsed by the payee named on the face, to require the presence of that payee at the bank or to send a representative of the bank out to the payee to ascertain whether or not that is his signature?

Mr. Jones: We object to any reference to custom on the ground that custom has not been pleaded or made an issue in this case. We object to it further on the ground that it is incompetent, irrelevant, and immaterial. [193]

Mr. Wood: We don't claim it for custom. We hope to show the mechanics of operating in that method.

The Court: I think it is incompetent for this reason that I think the rule of law may have something to do with it, irrespective of what the facts are. I think perhaps you assume that duty, al-

(Testimony of E. F. Munly.)

though I am not definitely ruling on that. I think the evidence is incompetent. Your duties depend on the duties that you are charged with by law, and not custom.

Mr. Wood: That is true, your Honor. The only reason I ask the question is that in the authorities that point was run into, and if it was applicable there I think it would be applicable here. It is mechanically impossible to do that.

The Court: Well, I don't think it makes much difference if you are charged with it by law whether it is impossible or not.

Q. (By Mr. Wood) In paying the checks involved here, Mr. Munly, are you able to state whether or not the bank believed that the respective payees named in those checks were then employees of the Interior Warehouse?

Mr. Jones: I object to that as incompetent, immaterial, and irrelevant, on the ground that they are charged with a positive duty upon which they assume the complete risk of knowing that, and their belief has nothing whatever to do with the case.

The Court: I don't think that is true regarding the question whether they are employed or not; I don't think that makes much [194] difference, but he may answer.

A. Yes, we do believe that the payees—we did believe it in this case.

Q. (By Mr. Wood) Did the bank in paying these several checks in suit here rely upon all of the respective endorsements appearing upon the checks?

(Testimony of E. F. Munly.)

A. Yes.

Q. Did you make a check of these books and records and documents that are in court here at my request?

A. Yes.

Q. Did you make it with Mr. I. D. Wood, an accountant?

A. Yes.

Mr. Wood: Mr. Bailiff, will you hand him the audit, No. 3, the original that is in evidence?

Q. Referring to Schedule 1, Mr. Munly, of that audit, Schedule 1 attached to Exhibit A, you find the first group of checks there, 21 checks listed. As to those 21 checks I will ask you whether or not you checked them back against the dock superintendent's timebook.

A. Yes.

Q. How many out of those 21 did you find in the dock superintendent's timebook?

Mr. Jaureguy: We want to make the same objection that we made to Mr. Griffis' testimony, on the same ground, that there is no duty on the part of the Interior to have ascertained the [195] existence or non-existence or those names, and the existence or non-existence of those names on the timebook would in no way have any bearing on the breach of any duty owed by the Interior to the bank.

The Court: I allowed that question as to the employees or officers of the Interior Warehouse Company, and also to explain the audit, but as to this witness, he didn't make the audit and he is not connected with the Interior Warehouse Company.

Mr. Wood: You may cross-examine.

(Testimony of E. F. Munly.)

Cross-Examination

By Mr. Jones:

Q. You said you relied on prior endorsements. Will you explain that a little more fully? What did you mean by relying on prior endorsements?

A. Well, we rely on everything about a check when it is presented, on all endorsements, and the drawer of the check, and everything about the check.

Q. Some of these checks, as a matter of fact, I think two of them, didn't pass through a clearing house; they were endorsed directly at your bank. Did you rely on prior endorsements there?

A. We didn't relinquish any rights against the prior endorsement. I don't know, because I didn't cash those checks, from my own personal knowledge—I don't know whether that payee was there at the time these were cashed. I do recall seeing more than one endorsement on the checks. [196]

Q. Now as a matter of fact what you were relying on was in most instances the clearinghouse stamp, wasn't it?

A. As I say, we rely on all of the endorsements on the checks. When we pay any check we get the endorsement of the party to whom we make the payment as a receipt.

Q. What do you mean by relying on a prior endorsement?

A. Well, that we have certain legal rights against all of the endorsers.

(Testimony of E. F. Munly.)

Q. Then what you mean by the word "reliance" is that you are willing to cash the check because you are willing to look to the prior endorsers?

The Court: Well, perhaps you had better tell the witness what you mean by the word "reliance". You asked him in the first place whether he relied upon it, or what he relied on, or something of that sort, and he is answering as I understand it the question that you made about reliance.

Mr. Jones: Well, if the Court please, I was taking that from his direct examination. He said he had relied on the prior endorsements, and I am trying to find out what he means by relying.

The Court: I may have been mistaken.

Q. (By Mr. Jones) You are a member of the Portland Clearing House, aren't you?

A. Yes.

Q. And it is a practice of banks that are members of the Portland [197] Clearing House to accept the Clearing House stamp as a guaranty of prior endorsements, isn't it?

A. Just the same as any endorsement is a guaranty of prior endorsements.

Q. But as a matter of fact there is a Clearing House rule to that effect, isn't there?

A. I can't say from my recollection whether it is in the Clearing House rules or not.

Q. Do you recall a rule to the effect that the Clearing House stamp shall guarantee previous endorsements on all items cleared except on certificates of deposit?

(Testimony of E. F. Munly.)

Mr. Wood: I object to that as incompetent, irrelevant, immaterial, and not proper cross-examination.

The Court: He may answer.

A. I presume you are reading from the Portland Clearing House rules. My best testimony would be if I could see the book.

Mr. Jones: Yes, you may see the book. Mr. Bailiff, would you hand him this book?

(The book was handed to the witness.)

A. Those words appear here.

Q. That is the rule? A. Yes.

Q. Now supposing there isn't any Clearing House stamp on a check. There wasn't on a few of these, but they were deposited right directly into your bank. Then what did you do? [198]

A. The party who received the money from us would be required to endorse the check.

Q. Yes, but what about the payee? How did you go about determining the authenticity of the payee's endorsement?

A. We didn't determine the authenticity of the payee's endorsement.

Q. Why not?

A. Well, it is impractical. As I stated a little earlier, we have between eight and ten thousand items that go through, and the banking business couldn't be conducted if the bank was required to have the payee there and pay the money to the payee only.

(Testimony of E. F. Munly.)

Q. And in addition you were relying on the other endorsements?

A. We rely on all of the endorsements.

Mr. Jones: That is all.

Redirect Examination

By Mr. Wood:

Q. Just a minute, Mr. Munly. Do you know when that rule that Mr. Jones directed your attention to went into effect? Does that book state?

The Court: Oh, I think counsel can stipulate that that is the rule.

A. I don't think there is any question but what that is the rule.

Mr. Wood: That is all.

The Court: I think we are wasting a lot of time.

(Witness excused.) [199]

I. D. WOOD

was thereupon produced as a witness in behalf of the defendant herein, and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Borden Wood:

Q. Your name is I. D. Wood? A. Yes, sir

Q. What is your occupation, Mr. Wood?

A. Certified public accountant.

Q. Where are your offices?

A. In the Mayer Building.

(Testimony of I. D. Wood.)

Q. In Portland? A. Yes, sir.

Q. How long have you been a certified public accountant in Oregon? A. Since 1921.

Q. Were you at any time president of the Oregon Association of C.P.A.'s? A. Yes, sir.

Q. Do you hold that office now?

A. As president?

Q. Yes. A. No, sir.

Q. Did you at my request examine the documents and papers which are in issue here marked Pre-Trial Exhibits 19 to 35, inclusive, [200] except 35 and 32, which have been ruled out? Did you examine all those books and records?

A. I glanced through some of the records in the court the other day.

Q. And that was at my request? A. Yes.

Q. By the way, you and I are not related?

A. No, sir.

Q. That is the first time I had the chance to deny the relation. Tell me, in making that examination did you make any test checks? Tell me first, what is a test check in accountancy?

A. Well, in accountancy most of the auditing is done by test checking. It would not be practical to do a detailed check of every item from the expense standpoint and the time involved, so it is usually by test checking, and if that does not uncover anything it is accepted as satisfactory and that everything is correct.

Q. Did you make a test check on these documents?

(Testimony of I. D. Wood.)

A. I glanced through some of them and made test checks of certain items.

Mr. Borden Wood: Will you let the witness have Exhibit 3, please?

Q. Referring to Schedule 1, the first 21 checks there, did you make a check of those against the superintendent's time record?

Mr. Jaureguy: I want to object to that on the ground that it [201] is incompetent, irrelevant, and immaterial, and there is no duty on the part of the Interior Warehouse to obtain such a test check—no duty owing to the bank.

Mr. Wood: This is merely corroborative of Griffis' testimony made by a competent C.P.A.

Mr. Jaureguy: I call the Court's attention to the fact that I made the same objection when Mr. Griffis was on the stand, but I think you perhaps admitted it on some other theory than that that we had in our mind.

The Court: The objection is sustained.

Q. (By Mr. Borden Wood): Do you have occasion in connection with the practice of your profession to audit the books and records of a great many concerns?

A. Yes, sir.

Q. Small and large?

A. Yes, sir.

Q. I will ask you whether or not in your opinion as a C.P.A. it connotes with modern accountancy, and did from 1935 to 1939, to have but one man detailed to the duties of getting up the payrolls, having checks on payrolls made up, procuring the sig-

(Testimony of I. D. Wood.)

natures to the checks by a properly authorized officer, rechecking delivery of the signed checks, in charge of the duty of distribution, at the end of the month securing the paid checks, reconciling the bank account, and making all of the entries in the books pertaining thereto. [202]

Mr. Jaureguy: I object to that on the ground that it is incompetent, irrelevant, and immaterial, on the ground that there was no duty owed by the Interior to the Bank of California to install a system which connotes, I think he said, with modern accounting practice, and second, that some of the items mentioned by counsel certainly were not matters on which the Interior owed a duty to the Bank of California. By that I mean that we object to each one separately. There was no duty to perform one of those duties or all of them in combination.

The Court: The objection is sustained, and upon the ground that it is asking expert testimony upon a question of negligence that the Court has to decide in the final analysis.

Q. (By Mr. Borden Wood): Did your examination of these books and records disclose erasures or alterations made in them?

A. We noticed on the timebooks——

Mr. Jaureguy (Interrupting): I think we are entitled to a "yes" or "no" answer.

The Witness: May I have the question?

(The question was read by the reporter.)

(Testimony of I. D. Wood.)

A. Yes, sir.

Q. (By Mr. Borden Wood): Did you find erasures and alterations in those records?

A. Yes, sir.

Q. What is the difference between a test check and a detailed yearly audit? [203]

Mr. Jones: Just a minute; we object to that on the ground that it is incompetent, irrelevant, and immaterial and on the fact that the thing has all been gone into as far as the audit that was made was concerned. I would like to incorporate as grounds of this objection those just made by Mr. Jaureguy and would like to add to them this: That there is no duty on the part of any depositor to maintain any set of books for the benefit of any bank beyond the stub book or the carbon copies of the checks.

The Court: The trouble is, I don't think the testimony is being offered on these checks. That has been true all the way through. My theory is this: In your case you did talk about test checks and detailed audits, and so forth. I think there may be a difference in the theories that your witnesses advanced, and this defendant has a right to go into that. He may answer.

The Witness: May I have that question again?
(The question was read by the reporter.)

A. The way that question is worded, I may have to explain a little bit. The question states "a detailed yearly audit". I presume it means an an-

(Testimony of I. D. Wood.)

nual audit. There is a detailed audit which happens where there is something uncovered, where you check every item, but as a rule a detailed annual audit is a complete audit in which an audit is made by test checking, not checking every item, but making your test sufficient to satisfy yourself that everything is correct. [204]

Q. Is a balance sheet audit a thorough one or a superficial one?

Mr. Jaureguy: I object to that as calling for a conclusion of the witness.

The Court: He is testifying as an expert. He may answer.

Mr. Jones: I would like to add to that objection the fact that a balance sheet audit, whether it is a thorough one or not, may depend entirely upon the particular auditor doing it and what the purpose of the balance sheet audit is.

The Court: You may argue that to the Court.

A. A balance sheet audit can be a thorough audit, but it is only presenting a status as of one date. It covers operations only over a certain period. A balance sheet audit would present the status as at March 31st, as in this case, or December 31st, or some particular date, but it would not cover the operations for the year.

Q. (By Mr. Borden Wood): It would just be based on the balance sheet?

A. Based on the financial status of the company at a certain time.

(Testimony of I. D. Wood.)

Mr. Borden Wood: You may cross-examine.

Mr. Jones: No cross-examination.

Mr. Borden Wood: That is all, Mr. Wood.

(Witness excused.)

Mr. Wood: Your Honor, that is the defendant's case. We rest. [205]

The Court: Do you have some testimony?

Mr. Jones: We also rest, and I wonder—the hour is rather late. I could hardly conclude before five o'clock, and I wonder if it wouldn't be a little better—I can probably sum this up in shorter time if I had the evening to organize my—

The Court (Interrupting): I could probably hear this argument in the morning, but I personally would rather have the matter briefed and submitted on briefs, and then if I feel it is necessary to have an oral argument I could call for it later.

Mr. Jones: That would be very agreeable with us.

Mr. Wood: That is satisfactory to us.

The Court: I would rather do that. I would rather have counsel study it before I have an oral argument.

Mr. Wood: Does your Honor wish to set time limits now in getting those in?

The Court: Yes, I will be glad to do that.

Mr. Jones: Your Honor, I was out of town for seven or eight straight weeks, and I have still two matters to settle with the State and Federal Government. I wonder if I could have under the circumstances about fifteen days.

Mr. Wood: That is all right, your Honor, and fifteen days for us to answer?

The Court: That will be sometime in April.

Mr. Wood: Ten would be satisfactory to us. Perhaps you can give Mr. Jones fifteen and I can get mine in in ten days. [206]

The Court: Well, I will extend to you the same time as Mr. Jones, but if you wish to put it in earlier I can take it under advisement sooner.

Mr. Jones: And if we can get our brief in sooner than fifteen days we will do it. We will do it just as rapidly as possible.

The Court: Yes, I think that will fall about right. My time in April is pretty well scheduled and I doubt if I can consider the detailed facts before then in any event, but I will extend at this time fifteen days to plaintiffs, and fifteen days after their brief comes in to the defendant. Do you desire any reply brief?

Mr. Jones: Five days for the reply brief.

The Court: All right; and if I am not satisfied after having read the briefs—I will probably read them as they come in preliminarily, and if I have any questions then I will call for an oral argument and set it down. The case will not be submitted until I advise you or call for an oral argument. In that connection, though, there are some things that may not be very well formulated in my own mind, and there are some questions that I would like to have you consider. One of those is this: What is the effect of the negotiable instruments law re-

garding checks written to non-existent or fictitious persons? I notice that there are some endorsers on these checks that are in the 107 in evidence, and I was wondering if there was any [207] duty on the Court to order their inclusion in this lawsuit.

Mr. Jaureguy: You say inclusion in this lawsuit?

The Court: Yes.

Mr. Jaureguy: Everybody here has been hoping somebody would get them in, but nobody has done it.

The Court: Well, I have kind of thought everybody thought the water was cold, and I was wondering whether it was my duty to order them in.

Mr. Jaureguy: I may say our position has been—if the Court cares to hear it—

The Court: Yes.

Mr. Jaureguy: Our position has been this, that the drawer of a check does not himself have a right of action against a person claiming under a forged endorsement who has collected from the bank, on the ground that where the payee's endorsement is forged the drawer's money is still in the bank and he can have no complaint against somebody who has collected on a spurious endorsement. I will say that there is some authority to the contrary, but whatever authority there is to the contrary, I can only reconcile it on this theory, that if we sue the endorser we certify the payment that the bank made, and so even on the theory of those who say we can sue such a person who gets it from the bank,

if we did go after him it would be on the ground that we are abandoning any action that we have against the bank. That is the only reason that we didn't make an effort to bring them in, although it has been our hope [208] before this case was over that they would be brought in. I think I speak for both plaintiffs here when I say that it has been our hope that the endorsers would get in, so that if your Honor found the bank was not liable they could be. It is also my theory that if on account of any of the contentions made in the affirmative answer the bank is not liable, then we are subrogated to the rights of the bank against their endorsers, and if this Court should hold that the bank is not liable then we would pursue that theory, although I must say I haven't found any decisions to support that. I think as far as we are concerned, we very much would like to see them in—and still would.

The Court: I have this theory, that I am given the power and the duty under the rules in certain circumstances to require persons to be brought into court that I think will completely settle one controversy. It seems to me that you can hardly divorce the rights of the endorsees. Assuming that this Court should hold that the bank were liable, then the position of the endorsees is to my mind prejudiced by that determination.

Mr. Jaureguy: I might say that there are several cases—I suppose it is unnecessary to tell your Honor—from other jurisdictions under various

state practices similar to the Federal practice where that has been done.

The Court: I have made no study of the question at all, but it occurred to me during the course of this case that it [209] might be prejudicial—I don't mean directly prejudicial, but it might be indirectly prejudicial to the rights of the endorsees——

Mr. Jaureguy (Interrupting): Yes, I think that is true.

The Court (Continuing): ——if I should make a determination of some of these defenses without their presence.

Mr. Jaureguy: There is this too, your Honor, that in this case all the endorsers can be brought in, whereas if this case is terminated without them being brought in it would mean that somebody—either the bank or us—will have to bring several different lawsuits against the endorsers, because I don't see under what theory the bank could bring in all the endorsers in one lawsuit or that we could; whereas in this case they could all be brought in.

Mr. Wood: They can't be all brought in, because on the 19 missing ones no one knows who the endorsers are. We think if the plaintiffs had that desire they could have expressed it in their complaint in the first instance.

Mr. Jaureguy: I would like to hear from Mr. Wood what his opinion is on that.

Mr. Wood: Well, you could have brought them in. There is no reason why we should have to bring them in here.

Mr. Jaureguy: I suggest that we are not entitled to any censure for not bringing them in, because nobody has pointed out any theory under which we could have joined them and joined the [210] bank.

The Court: The Court is not censuring you.

Mr. Jaureguy: No, but I don't like to even have Mr. Wood censure me.

Mr. Wood: I am not censuring you.

Mr. Jones: I should like to read one of the paragraphs that I think answers most of the questions that come up, insofar as the plaintiffs are concerned. It is the case——

The Court (Interrupting): Mr. Jones, I am just suggesting the question now.

Mr. Jones: This is the point I want to call to your attention. Even if these collecting banks were brought in, or the other prior endorsers, they have no right and cannot suggest that the Bank of California even set up such defenses as they did as against the plaintiffs. If there were any defenses such as they set up they are entirely between the plaintiffs and the Bank of California, and there is nothing that has been done here that is to the prejudice of any endorser or any collecting bank such as the First or the United States National, because it has been directly held that they cannot insist on even the Bank of California stating those defenses, if they are defenses.

The Court: I am speaking of this realistically, not talking about the legal principles. One point that has interested me in the case is the effect of

these bank statements and the apparent limitation that is placed on them. I would like to see [211] if there is any authority on that, and have that point briefed.

There have been suggestions at various times in the case as to whose money the bank was paying and whether they were paying their own or whether they were paying somebody's else, and I want that point briefed and cleared up so that I will have my mind clear on the basis of that. I think that may not have much to do with the final determination of it, but for the theoretical basis of determination I want to know what the parties think about that; whose funds were being paid out by the bank.

Now I take some interest in another question too, and that is: What effect is it going to have where you find one of these checks endorsed by Crowe? Those are a separate series. They are comparatively few, but there are some. What effect is that going to have? I also noticed one where he is the second endorser, and the third endorser. I didn't make close enough check to find whether any were presented by Crowe himself at a bank. I think there were none. If there were any I would like to have that circumstance also covered.

Now since we have finished the trial of the case I am going to give you an idea of what I was thinking about as to some of the *bestimony*. The theory I have in the back of my mind is not the theory of negligence. The duty of a bank is squarely raised; also I think the duty of the Interior to the

bank. Without defining what those duties are I want you to brief the ques- [212] tion of whether these checks were not issued to fictitious, non-existent payees by the Interior; in other words, a responsible employe of the Interior, charged with the duty of distribution—whether or not the Interior did not issue the checks to the persons to whom they were intended and whether the intent of the signer of the check had anything to do with it. That last I think is an interesting and complicated question.

If there is nothing more, Gentlemen, the court is now adjourned until tomorrow morning at ten o'clock.

Mr. Jones: It is stipulated by and between the parties hereto that the Interior Warehouse Company may take out its journal and ledger upon condition that they are brought back in the same condition that they now are on order of the Court or request of any of the parties.

Mr. Miller: It is so stipulated.

The Court: And the Court so directs, based on the stipulation.

(Thereupon, at 4:45 o'clock P.M., March 27, 1941 the trial of the above entitled cause was concluded.) [213]

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

I, Edwin L. Holmes, hereby certify that I reported in shorthand the testimony and proceedings on the trial of the above entitled cause, that I subsequently caused my said shorthand notes to be reduced to typewriting, and that the foregoing transcript, Pages 1 to 213, both inclusive, constitutes a full, true, and accurate transcript of said testimony and proceedings, so taken by me in shorthand as aforesaid, and of the whole thereof.

Dated at Portland, Oregon, this 14th day of May, 1942.

EDWIN L. HOLMES

Reporter.

[Endorsed]: Filed July 9, 1942. [214]

[Endorsed]: No. 10188. United States Circuit Court of Appeals for the Ninth Circuit. American Surety Company, a Corporation, and E. L. McDougal, Appellants, vs. The Bank of California, National Association, a Corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed July 9, 1942.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10188

AMERICAN SURETY COMPANY OF NEW
YORK, a corporation, and E. L. McDUGAL,
Appellants,

vs.

THE BANK OF CALIFORNIA, NATIONAL
ASSOCIATION, a corporation,
Appellee.

STATEMENT OF POINTS TO BE RELIED
ON BY APPELLANTS

Pursuant to rule 19 (6) of the Rules of this Court the appellants, American Surety Company of New York and E. L. McDougal, present the following statement of the points on which they intend to rely on this appeal:

(1) The District Court had jurisdiction of this cause.

(2) Findings of Fact Nos. I, II, III, IV and V entered by the trial court correctly set forth facts of this case as established by the evidence.

(3) Finding of Fact No. VI entered by the trial court correctly sets forth facts of this case as established by the evidence, except the last paragraph thereof in which it is stated that there is no evidence of any of the endorsements on the back of the nineteen checks referred to in said finding other

than the oral testimony of Garth L. Crowe, and appellants contend that there is other evidence of said endorsements and that said endorsements were forgeries.

(4) Findings of Fact Nos. VII, VIII, IX, X, XI, XII and XIII entered by the trial court correctly set forth facts of this case as established by the evidence.

(5) Finding of Fact No. XIV entered by the trial court is erroneous and does not accurately set forth any facts established by the evidence in this case. It is the contention of the appellants that the discovery of the negotiations and cashing of said checks by said Crowe was discovered by Interior Warehouse Company within a reasonable time after the negotiations and cashing of said checks, and it is further the contention of appellants that is such discovery was not made within such reasonable time this fact is entirely immaterial in this case, since any such failure to discover was not the proximate cause of the loss.

(6) Finding of Fact No. XV entered by the trial court does not accurately or correctly set forth any facts established by the evidence, and the evidence does not prove the appellee was not guilty of any negligence or wrongdoing in the cashing of said checks, or any of them, or in charging the same or any of them to the account of said Interior Warehouse Company, but the evidence affirmatively establishes such negligence and wrongdoing in cashing said checks and in charging the same to the

account of Interior Warehouse Company. Appellants further contend that even though it should appear that the appellee was not guilty of negligence such fact is immaterial in this case, since the obligation of appellee bank to cash only checks having the proper endorsement was a contractual obligation, for the violation of which appellee was liable regardless of negligence or lack of negligence.

(7) The Conclusions of Law Nos. I and II entered by the trial court are correct conclusions of law and are applicable in this case.

(8) Conclusion of Law No. III entered by the trial court is an incorrect statement of the law and is based upon a misapprehension of the facts in this case. It is the position of the appellants not only that Interior Warehouse Company did discover the negotiations and cashing of said checks within a reasonable time thereafter, but also that any such failure would not justify a denial of recovery against appellee in this case.

(9) Conclusion of Law No. IV entered by the trial court is incorrect and erroneous in that it assumes that the principle of election of remedies is a partially satisfactory solution of this case. The position of appellants is that the principle of election of remedies is in no way involved in this case.

(10) Appellants agree with Conclusion of Law No. V entered by the trial court insofar as said conclusion states that there are independent contractual liabilities each running in favor of Interior Warehouse Company; but appellants contend that

the conclusion of law set forth in the second paragraph of said conclusion that the satisfaction of the obligation upon said insurance policies by appellants did not give rise to a legal or equitable, or any, right in appellants to recover against appellee is erroneous, and appellants contend that the satisfaction of such obligation by said insurance companies gave rise by subrogation, or assignment, or both, to a right of action on the part of said insurance companies against appellee.

(11) Appellants agree with Conclusion of Law No. VI entered by the trial court, except the following portions thereof:

That portion of Conclusion VI in which the court states:

“The fact that Interior Warehouse Company may have had another remedy against defendant on a different contract if Crowe had not been insured does not render defendant liable to the insurers, who as to it stand in the same position as Crowe.”

and also the following conclusion of law

“The Interior Warehouse Company suffered no loss, and there was no claim against defendant which could be assigned or which could inure to the insurers, or either of them, for subrogation.”

It is the position of appellants that the payment of said loss under said insurance contracts resulted in subrogating said insurance companies to the right of Interior Warehouse Company against appellee bank.

(12) Conclusion of Law No. VII entered by the trial court is an incorrect conclusion of law and it is the position of appellants that because of the principles of assignment and subrogation appellants, and both of them, are entitled to recover from defendant in this case.

(13) Conclusion of Law No. VIII entered by the trial court is erroneous, it being the position of appellants that judgment should not have been entered in favor of appellee, but that judgment should have been entered in favor of appellants and against appellee.

(14) It is the further position of appellants that the court erred in entering the final judgment, dated January 20, 1942, signed by the Honorable James Alger Fee, Judge of said Court, which said judgment dismissed appellants' complaint and gave judgment for appellee for its costs and disbursements.

(15) The court erred in failing to enter judgment in favor of appellants, and the court should have entered judgment in favor of appellants, as prayed for in appellants' complaint.

Respectfully submitted

PLOWDEN STOTT, NICHOLAS
JAUREGUY

MAURICE D. SUSSMAN, E. L.
McDOUGAL

Attorneys for Appellants.

Due and legal service of the foregoing Statement of Points to be Relied on by Appellants is hereby acknowledged at Portland, Multnomah County, Oregon, this 10th day of July, 1942, by receipt of a duly certified copy there of as required by law.

BORDEN WOOD

Of Attorneys for Appellee

[Endorsed]: Filed July 13, 1942.

[Title of Circuit Court of Appeals and Cause.]

APPLICATION FOR PERMISSION TO OMIT
CERTAIN EXHIBITS FROM PRINTING
AND AFFIDAVIT IN SUPPORT THERE-
OF.

American Surety Company of New York, a corporation, and E. L. McDougal, appellants, hereby respectfully make application for an order dispensing with the necessity of printing the exhibits transmitted to this Court by the District Court, reserving, however, the right to all parties to refer to said exhibits in their briefs and arguments by reference to the original exhibits and to that end represent:

1. The exhibits forwarded to this court by the District Court are bulky or otherwise unsuitable for printing as they consist of numerous checks, general ledgers and journals, payroll sheets, time books,

bank statements, duplicate payroll checks, expense reports, and similar lengthy books and documents, and said exhibits are principally material by reason of inferences which it may be claimed can be drawn from methods of conducting business as disclosed therein rather than the contents of any particular items.

2. As it may become necessary in presenting the appeal to refer to certain of said exhibits in their original form, appellants request that any order dispensing with the necessity of printing allow the parties to refer to said exhibits in their briefs and arguments by reference to the original exhibits.

Wherefore, appellants respectfully request that the order hereinabove requested be made.

Dated: San Francisco, July 9th, 1942.

MAURICE D. SUSSMAN

E. L. McDOUGAL

PLOWDEN STOTT

NICHOLAS JAUREGUY

Attorneys for Appellants

(Duly verified.)

State of Oregon

County of Multnomah—ss.

Due and legal service of the foregoing Application is hereby acknowledged at Portland, Multnomah County, Oregon, this 10th day of July, 1942, by receipt of a duly certified copy thereof as required by law.

BORDEN WOOD

Of Attorneys for Appellee

So ordered:

FRANCIS A. GARRECHT

United States Circuit Judge

[Endorsed]: Filed Jul 13, 1942.